UNITED STATES REPORTS

VOLUME 466

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1983

MARCH 26 THROUGH MAY 15, 1984

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
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HENRY C. LIND, REPORTER OF DECISIONS.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the CHIEF JUSTICE be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1983

KOEHLER, WARDEN *v.* ENGLE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83–1. Argued February 28, 1984—Decided March 26, 1984

707 F. 2d 241, affirmed by an equally divided Court.

Louis J. Caruso, Solicitor General of Michigan, argued the cause for petitioner. With him on the brief were *Frank J. Kelley*, Attorney General, and *Thomas C. Nelson*, Assistant Attorney General.

John Nussbaumer argued the cause and filed a brief for respondent.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE MARSHALL took no part in the decision of this case.

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL. *v.* HYDE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–1031. Argued November 2, 1983—Decided March 27, 1984

A hospital governed by petitioners has a contract with a firm of anesthesiologists requiring all anesthesiological services for the hospital's patients to be performed by that firm. Because of this contract, respondent anesthesiologist's application for admission to the hospital's medical staff was denied. Respondent then commenced an action in Federal District Court, claiming that the exclusive contract violated § 1 of the Sherman Act, and seeking declaratory and injunctive relief. The District Court denied relief, finding that the anticompetitive consequences of the contract were minimal and outweighed by benefits in the form of improved patient care. The Court of Appeals reversed, finding the contract illegal *"per se."* The court held that the case involved a "tying arrangement" because the users of the hospital's operating rooms (the tying product) were compelled to purchase the hospital's chosen anesthesiological services (the tied product), that the hospital possessed sufficient market power in the tying market to coerce purchasers of the tied product, and that since the purchase of the tied product constituted a "not insubstantial amount of interstate commerce," the tying arrangement was therefore illegal *"per se."*

Held: The exclusive contract in question does not violate § 1 of the Sherman Act. Pp. 9–32.

(a) Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case the analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, consideration must be given to whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement. Pp. 9–18.

(b) No tying arrangement can exist here unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services. The

fact that the exclusive contract requires purchase of two services that would otherwise be purchased separately does not make the contract illegal. Only if patients are forced to purchase the contracting firm's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of the firm. Pp. 18–25.

(c) The record does not provide a basis for applying the *per se* rule against tying to the arrangement in question. While such factors as the Court of Appeals relied on in rendering its decision—the prevalence of health insurance as eliminating a patient's incentive to compare costs, and patients' lack of sufficient information to compare the quality of the medical care provided by competing hospitals—may generate "market power" in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying. Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. The fact that patients of the hospital lack price consciousness will not force them to take an anesthesiologist whose services they do not want. Similarly, if the patients cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement. Pp. 26–29.

(d) In order to prevail in the absence of *per se* liability, respondent has the burden of showing that the challenged contract violated the Sherman Act because it unreasonably restrained competition, and no such showing has been made. The evidence is insufficient to provide a basis for finding that the contract, as it actually operates in the market, has unreasonably restrained competition. All the record establishes is that the choice of anesthesiologists at the hospital has been limited to one of the four doctors who are associated with the contracting firm. If respondent were admitted to the hospital's staff, the range of choice would be enlarged, but the most significant restraints on the patient's freedom to select a specific anesthesiologist would nevertheless remain. There is no evidence that the price, quality, or supply or demand for either the "tying product" or the "tied product" has been adversely affected by the exclusive contract, and no showing that the market as a whole has been affected at all by the contract. Pp. 29–32.

686 F. 2d 286, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 32. O'CON-

NOR, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 32.

Frank H. Easterbrook argued the cause for petitioners. With him on the briefs were *Lucas J. Giordano*, *Thomas J. Reed*, and *Henry S. Allen, Jr.*

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney General Lipsky*, *Barry Grossman*, and *Andrea Limmer*.

John M. Landis argued the cause for respondent. With him on the brief was *Phillip A. Wittman*.*

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a *per se* violation of § 1 of the Sherman Act[1] because every patient undergoing

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*Briefs of *amici curiae* urging reversal were filed for the American Hospital Association by *Richard L. Epstein*, *Robert W. McCann*, and *John J. Miles*; for the College of American Pathologists by *Jack R. Bierig*; and for the National Association of Private Psychiatric Hospitals by *Joel I. Klein*.

Briefs of *amici curiae* urging affirmance were filed for the American Society of Anesthesiologists, Inc., by *John Landsdale, Jr.*, and *Michael Scott*; for the Association of American Physicians & Surgeons, Inc., by *Kent Masterson Brown*; and for the Louisiana State Medical Society by *Henry B. Alsobrook, Jr.*, *Frank M. Adkins*, and *Richard B. Eason II*.

Briefs of *amici curiae* were filed for the American Association of Nurse Anesthetists by *Phil David Fine*, *Robert F. Sylvia*, *Richard E. Verville*, and *Susan M. Jenkins*; and for the Louisiana Hospital Association et al. by *Ricardo M. Guevara*.

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1. Respondent has

surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board-certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital staff.[2] After trial, the District Court denied relief, finding that the anticompetitive consequences of the Roux contract were minimal and outweighed by benefits in the form of improved patient care. 513 F. Supp. 532 (ED La. 1981). The Court of Appeals reversed because it was persuaded that the contract was illegal *"per se."* 686 F. 2d 286 (CA5 1982). We granted certiorari, 460 U. S. 1021 (1983), and now reverse.

I

In February 1971, shortly before East Jefferson Hospital opened, it entered into an "Anesthesiology Agreement" with Roux & Associates (Roux), a firm that had recently been organized by Dr. Kermit Roux. The contract provided that any anesthesiologist designated by Roux would be admitted to the hospital's medical staff. The hospital agreed to

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standing to enforce § 1 by virtue of § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15.

[2] In addition to seeking relief under the Sherman Act, respondent's complaint alleged violations of 42 U. S. C. § 1983 and state law. The District Court rejected these claims. The Court of Appeals passed only on the Sherman Act claim.

provide the space, equipment, maintenance, and other supporting services necessary to operate the anesthesiology department. It also agreed to purchase all necessary drugs and other supplies. All nursing personnel required by the anesthesia department were to be supplied by the hospital, but Roux had the right to approve their selection and retention.[3] The hospital agreed to "restrict the use of its anesthesia department to Roux & Associates and [that] no other persons, parties or entities shall perform such services within the Hospital for the ter[m] of this contract." App. 19.[4]

The 1971 contract provided for a 1-year term automatically renewable for successive 1-year periods unless either party elected to terminate. In 1976, a second written contract was executed containing most of the provisions of the 1971 agreement. Its term was five years and the clause excluding other anesthesiologists from the hospital was deleted;[5] the hospital nevertheless continued to regard itself as committed to a closed anesthesiology department. Only Roux was permitted to practice anesthesiology at the hospital. At the

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[3] The contract required all of the physicians employed by Roux to confine their practice of anesthesiology to East Jefferson.

[4] Originally Roux agreed to provide at least two full-time anesthesiologists acceptable to the hospital's credentials committee. Roux agreed to furnish additional anesthesiologists as necessary. The contract also provided that Roux would designate one of its qualified anesthesiologists to serve as the head of the hospital's department of anesthesia.

The fees for anesthesiological services are billed separately to the patients by the hospital. They cover the hospital's costs and the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.

[5] "Roux testified that he requested the omission of the exclusive language in his 1976 contract because he believes a surgeon or patient is entitled to the services of the anesthesiologist of his choice. He admitted that he and others in his group did work outside East Jefferson following the 1976 contract but felt he was not in violation of the contract in light of the changes made in it." 513 F. Supp. 532, 537 (ED La. 1981).

time of trial the department included four anesthesiologists. The hospital usually employed 13 or 14 certified registered nurse anesthetists.[6]

The exclusive contract had an impact on two different segments of the economy: consumers of medical services, and providers of anesthesiological services. Any consumer of medical services who elects to have an operation performed at East Jefferson Hospital may not employ any anesthesiologist not associated with Roux. No anesthesiologists except those employed by Roux may practice at East Jefferson.

There are at least 20 hospitals in the New Orleans metropolitan area and about 70 percent of the patients living in Jefferson Parish go to hospitals other than East Jefferson. Because it regarded the entire New Orleans metropolitan area as the relevant geographic market in which hospitals compete, this evidence convinced the District Court that East Jefferson does not possess any significant "market power"; therefore it concluded that petitioners could not use the Roux contract to anticompetitive ends.[7] The same evidence led the Court of Appeals to draw a different conclusion. Noting that 30 percent of the residents of the parish go to East Jefferson Hospital, and that in fact "patients tend to choose hospitals by location rather than price or quality," the Court of

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[6] Approximately 875 operations are performed at the hospital each month; as many as 12 or 13 operating rooms may be in use at one time.

[7] The District Court found:

"The impact on commerce resulting from the East Jefferson contract is minimal. The contract is restricted in effect to one hospital in an area containing at least twenty others providing the same surgical services. It would be a different situation if Dr. Roux had exclusive contracts in several hospitals in the relevant market. As pointed out by plaintiff, the majority of surgeons have privileges at more than one hospital in the area. They have the option of admitting their patients to another hospital where they can select the anesthesiologist of their choice. Similarly a patient can go to another hospital if he is not satisfied with the physicians available at East Jefferson." *Id.*, at 541.

Appeals concluded that the relevant geographic market was the East Bank of Jefferson Parish. 686 F. 2d, at 290. The conclusion that East Jefferson Hospital possessed market power in that area was buttressed by the facts that the prevalence of health insurance eliminates a patient's incentive to compare costs, that the patient is not sufficiently informed to compare quality, and that family convenience tends to magnify the importance of location.[8]

The Court of Appeals held that the case involves a "tying arrangement" because the "users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product)." *Id.*, at 289. Having defined the relevant geographic market for the tying product as the East Bank of Jefferson Parish, the court held that the hospital possessed "sufficient market power in the tying market to coerce purchasers of the tied product." *Id.*, at 291. Since the purchase of the tied product constituted a "not insubstantial amount of interstate commerce," under the Court of Appeals' reading of our decision in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 11 (1958), the tying arrangement was therefore illegal *"per se."*[9]

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[8] While the Court of Appeals did discuss the impact of the contract upon patients, it did not discuss its impact upon anesthesiologists. The District Court had referred to evidence that in the entire State of Louisiana there are 156 anesthesiologists and 345 hospitals with operating rooms. The record does not tell us how many of the hospitals in the New Orleans metropolitan area have "open" anesthesiology departments and how many have closed departments. Respondent, for example, practices with two other anesthesiologists at a hospital which has an open department; he previously practiced for several years in a different New Orleans hospital and, prior to that, had practiced in Florida. The record does not tell us whether there is a shortage or a surplus of anesthesiologists in any part of the country, or whether they are thriving or starving.

[9] The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the exclusive contract was justified by quality considerations. See 686 F. 2d, at 292.

II

Certain types of contractual arrangements are deemed unreasonable as a matter of law.[10] The character of the restraint produced by such an arrangement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found.[11] A price-fixing agreement between competitors is the classic example of such an arrangement. *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 343–348 (1982). It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *"per se."*[12] The rule was first enunciated in *International Salt Co.* v. *United States*, 332 U. S. 392, 396 (1947),[13] and has been en-

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[10] "For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with nonmembers of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*." *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522–523 (1948) (footnotes omitted).

[11] See, *e. g.*, *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49–50 (1977).

[12] The District Court intimated that the principles of *per se* liability might not apply to cases involving the medical profession. 513 F. Supp., at 543–544. The Court of Appeals rejected this approach. 686 F. 2d, at 292–294. In this Court, petitioners "assume" that the same principles apply to the provision of professional services as apply to other trades or businesses. Brief for Petitioners 4, n. 2. See generally *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978).

[13] The roots of the doctrine date at least to *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502 (1917), a case holding that the sale of a patented film projector could not be conditioned on its use only with the patentee's films, since this would have the effect of extending the scope of the patent monopoly. See also *Henry* v. *Dick Co.*, 224 U. S. 1, 70–73 (1912) (White, C. J., dissenting).

dorsed by this Court many times since.[14] The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14, Congress expressed great concern about the anticompetitive character of tying arrangements. See H. R. Rep. No. 627, 63d Cong., 2d Sess., 10–13 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 6–9 (1914).[15] While this case

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[14] See *United States Steel Corp.* v. *Fortner Enterprises*, 429 U. S. 610, 619–621 (1977); *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495, 498–499 (1969); *White Motor Co.* v. *United States*, 372 U. S. 253, 262 (1963); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962); *United States* v. *Loew's Inc.*, 371 U. S. 38 (1962); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958); *Black* v. *Magnolia Liquor Co.*, 355 U. S. 24, 25 (1957); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 608–609 (1953); *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305–306 (1949).

[15] See also 51 Cong. Rec. 9072 (1914) (remarks of Rep. Webb); *id.*, at 9084 (remarks of Rep. Madden); *id.*, at 9090 (remarks of Rep. Mitchell); *id.*, at 9160–9164 (remarks of Rep. Floyd); *id.*, at 9184–9185 (remarks of Rep. Helvering); *id.*, at 9409 (remarks of Rep. Gardner); *id.*, at 9410 (remarks of Rep. Mitchell); *id.*, at 9553–9554 (remarks of Rep. Barkley); *id.*, at 14091–14097 (remarks of Sen. Reed); *id.*, at 14094 (remarks of Sen. Walsh); *id.*, at 14209 (remarks of Sen. Shields); *id.*, at 14226 (remarks of Sen. Reed); *id.*, at 14268 (remarks of Sen. Reed); *id.*, at 14599 (remarks of Sen. White); *id.*, at 15991 (remarks of Sen. Martine); *id.*, at 16146 (remarks of Sen. Walsh); Spivack, The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response, 52 Antitrust L. J. 651, 664–665 (1983). For example, the House Report on the Clayton Act stated:

"The public is compelled to pay a higher price and local customers are put to the inconvenience of securing many commodities in other communities or through mail-order houses that can not be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monop-

does not arise under the Clayton Act, the congressional finding made therein concerning the competitive consequences of tying is illuminating, and must be respected.[16]

It is clear, however, that not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, par-

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oly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If a manufacturer who is using machines of the Shoe Machinery Co. were to purchase and place a machine manufacturered by any independent company in his establishment, the Shoe Machinery Co. could under its contracts withdraw all their machinery from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer. The General Film Co., by the same method practiced by the Shoe Machinery Co. under the lease system, has practically destroyed all competition and acquired a virtual monopoly of all films manufactured and sold in the United States. When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business is even worse than under the lease system." H. R. Rep. No. 627, 63d Cong., 2d Sess., 12–13 (1914).

Similarly, Representative Mitchell said: "[M]onopoly has been built up by these 'tying' contracts so that in order to get one machine one must take all of the essential machines, or practically all. Independent companies who have sought to enter the field have found that the markets have been preempted . . . . The manufacturers do not want to break their contracts with these giant monopolies, because, if they should attempt to install machinery, their business might be jeopardized and all of the machinery now leased by these giant monopolies would be removed from their places of business. No situation cries more urgently for relief than does this situation, and this bill seeks to prevent exclusive 'tying' contracts that have brought about a monopoly, alike injurious to the small dealers, to the manufacturers, and grossly unfair to those who seek to enter the field of competition and to the millions of consumers." 51 Cong. Rec. 9090 (1914).

[16] See generally, *e. g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 276–277 (1981); *New Orleans* v. *Dukes*, 427 U. S. 297, 303–304 (1976) *(per curiam)*.

ticularly if competing suppliers are free to sell either the entire package or its several parts.[17] For example, we have written that "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 7.[18] Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act. See *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495, 517–518 (1969) *(Fortner I)* (WHITE, J., dissenting); *id.*, at 524–525 (Fortas, J., dissenting).

Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

> "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. . . . By conditioning his sale of one commodity on

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[17] "Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6, n. 4.

[18] Thus, we have held that a seller who ties the sale of houses to the provision of credit simply as a way of effectively competing in a competitive market does not violate the antitrust laws. "The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." *United States Steel Corp.* v. *Fortner Enterprises*, 429 U. S., at 622 (footnote omitted).

the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others anyway." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 605 (1953).[19]

Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called "mar-

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[19] Accord, *Fortner I*, 394 U. S., at 508–509; *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 369–371 (1965); *United States* v. *Loew's Inc.*, 371 U. S., at 44–45; *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6. For example, JUSTICE WHITE has written:

"There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner I*, 394 U. S., at 512–514 (dissenting opinion) (footnotes omitted).

ket power"—to force a purchaser to do something that he would not do in a competitive market. See *United States Steel Corp.* v. *Fortner Enterprises*, 429 U. S. 610, 620 (1977) *(Fortner II)*; *Fortner I*, 394 U. S., at 503–504; *United States* v. *Loew's Inc.*, 371 U. S. 38, 45, 48, n. 5 (1962); *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6–7.[20] When "forcing" occurs, our cases have found the tying arrangement to be unlawful.

Thus, the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.[21] This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, *Fortner I*, 394 U. S., at 509,[22] and can in-

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[20] This type of market power has sometimes been referred to as "leverage." Professors Areeda and Turner provide a definition that suits present purposes. "'Leverage' is loosely defined here as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." 5 P. Areeda & D. Turner, Antitrust Law ¶ 1134a, p. 202 (1980).

[21] See Report of the Attorney General's National Committee to Study the Antitrust Laws 145 (1955); Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B. U. L. Rev. 661, 666–668 (1982); Slawson, A Stronger, Simpler Tie-In Doctrine, 25 Antitrust Bull. 671, 676–684 (1980); Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50, 60–62 (1958).

[22] See 3 Areeda & Turner, *supra* n. 20, ¶ 733e (1978); C. Kaysen & D. Turner, Antitrust Policy 157 (1959); L. Sullivan, Law of Antitrust § 156 (1977); O. Williamson, Markets and Hierarchies: Analysis and Anti-

crease the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie, *Fortner II*, 429 U. S., at 617.[23] And from the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.[24] In sum, to permit restraint of competition on the merits through tying arrangements would be, as we observed in *Fortner II*, to condone "the existence of power that a free market would not tolerate." 429 U. S., at 617 (footnote omitted).

Per se condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable.[25] Thus, application of the *per se* rule

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trust Implications 111 (1975); Pearson, Tying Arrangements and Antitrust Policy, 60 Nw. U. L. Rev. 626, 637–638 (1965).

[23] Sales of the tied item can be used to measure demand for the tying item; purchasers with greater needs for the tied item make larger purchases and in effect must pay a higher price to obtain the tying item. See P. Areeda, Antitrust Analysis ¶533 (2d ed. 1974); R. Posner, Antitrust Law 173–180 (1976); Sullivan, *supra* n. 22, § 156; Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957); Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62 (1960); Dam, Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be," 1969 S. Ct. Rev. 1, 15–16; Ferguson, Tying Arrangements and Reciprocity: An Economic Analysis, 30 Law & Contemp. Prob. 552, 554–558 (1965); Markovits, Tie-Ins, Reciprocity, and the Leverage Theory, 76 Yale L. J. 1397 (1967); Pearson, *supra* n. 22, at 647–653; Sidak, Debunking Predatory Innovation, 83 Colum. L. Rev. 1121, 1127–1131 (1983); Stigler, United States v. Loew's Inc.: A Note on Block-Booking, 1963 S. Ct. Rev. 152.

[24] Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits. See Craswell, *supra* n. 21, at 675–679.

[25] The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anti-

focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. See *Fortner I*, 394 U. S., at 501–502; *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6–7; *Times-Picayune*, 345 U. S., at 608–610; *International Salt*, 332 U. S., at 396. Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Once this threshold is surmounted, *per se* prohibition is appropriate if anticompetitive forcing is likely. For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. *United States* v. *Loew's Inc.*, 371 U. S., at 45–47. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–159 (1948); *International Salt*, 332

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competitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 350–351 (1982).

U. S., at 395–396; *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936).

The same strict rule is appropriate in other situations in which the existence of market power is probable. When the seller's share of the market is high, see *Times-Picayune Publishing Co.* v. *United States*, 345 U. S., at 611–613, or when the seller offers a unique product that competitors are not able to offer, see *Fortner I*, 394 U. S., at 504–506, and n. 2, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. Thus, in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958), we held that the railroad's control over vast tracts of western real estate, although not itself unlawful, gave the railroad a unique kind of bargaining power that enabled it to tie the sales of that land to exclusive, long-term commitments that fenced out competition in the transportation market over a protracted period.[26] When, however, the

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[26] "As pointed out before, the defendant was initially granted large acreages by Congress in the several Northwestern States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities. In disposing of its holdings the defendant entered into contracts of sale or lease covering at least several million acres of land which included 'preferential routing' clauses. The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper. So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition." 356 U. S., at 7–8 (footnote omitted).

seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market. See *Fortner I*, 394 U. S., at 499–500; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S., at 614–615.

In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement.

III

The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations.[27] At East Jefferson Hospital the package includes the services of the anesthesiologist.[28] Petitioners argue that the package does not involve a tying ar-

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[27] The physical facilities include the operating room, the recovery room, and the hospital room where the patient stays before and after the operation. The services include those provided by staff physicians, such as radiologists or pathologists, and interns, nurses, dietitians, pharmacists, and laboratory technicians.

[28] It is essential to differentiate between the Roux contract and the legality of the contract between the hospital and its patients. The Roux contract is nothing more than an arrangement whereby Roux supplies all of the hospital's needs for anesthesiological services. That contract raises only an exclusive-dealing question, see n. 51, *infra*. The issue here is whether the hospital's insistence that its patients purchase anesthesiological services from Roux creates a tying arrangement.

rangement at all—that they are merely providing a functionally integrated package of services.[29] Therefore, petitioners contend that it is inappropriate to apply principles concerning tying arrangements to this case.

Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.[30] In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), the Court held that a tying arrangement was not present because the arrangement did not link two distinct markets for products that were distinguishable in the eyes of buyers.[31] In

[29] See generally Dolan & Ralston, Hospital Admitting Privileges and the Sherman Act, 18 Hous. L. Rev. 707, 756–758 (1981); Kissam, Webber, Bigus, & Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 Calif. L. Rev. 595, 666–667 (1982).

[30] The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices. See *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661 (1944) (heating system and stoker switch); *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488 (1942) (salt machine and salt); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947) (same); *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938) (process patent and material used in the patented process); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936) (tabulators and tabulating punch cards); *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931) (ice cream transportation package and coolant); *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923) (gasoline and underground tanks and pumps); *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451 (1922) (shoe machinery and supplies, maintenance, and peripheral machinery); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 558–560 (ED Pa. 1960) (components of television antennas), aff'd, 365 U. S. 567 (1961) *(per curiam)*. In fact, in some situations the functional link between the two items may enable the seller to maximize its monopoly return on the tying item as a means of charging a higher rent or purchase price to a larger user of the tying item. See n. 23, *supra*.

[31] "The District Court determined that the Times-Picayune and the States were separate and distinct newspapers, though published under

Fortner I, the Court concluded that a sale involving two independent transactions, separately priced and purchased from the buyer's perspective, was a tying arrangement.[32] These

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single ownership and control. But that readers consciously distinguished between these two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and the States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans. Although advertising space in the Times-Picayune, as the sole morning daily, was doubtless essential to blanket coverage of the local newspaper readership, nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential. We must assume, therefore, that the readership 'bought' by advertisers in the Times-Picayune was the selfsame 'product' sold by the States and, for that matter, the Item.

"The factual departure from the 'tying' cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same." 345 U. S., at 613–614 (footnote omitted).

[32] "There is, at the outset of every tie-in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved. In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. It will be time enough to pass on the issue of credit sales when a case involving it actually arises. Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased. Whatever the standards for determining exactly when a transaction in-

cases make it clear that a tying arrangement cannot exist unless two separate product markets have been linked.

The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying. The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule.[33] The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying—that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item.[34] Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services

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volves only a 'single product,' we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product." 394 U. S., at 507 (footnote omitted).

[33] Professor Dam has pointed out that the *per se* rule against tying can be coherent only if tying is defined by reference to the economic effect of the arrangement.

"[T]he definitional question is hard to separate from the question when tie-ins are harmful. Yet the decisions, in adopting the per se rule, have attempted to flee from that economic question by ruling that tying arrangements are presumptively harmful, at least whenever certain nominal threshold standards on power and foreclosure are met. The weakness of the per se methodology is that it places crucial importance on the definition of the practice. Once an arrangement falls within the defined limits, no justification will be heard. But a per se rule gives no economic standards for defining the practice. To treat the definitional question as an abstract inquiry into whether one or two products is involved is thus to compound the weakness of the per se approach." Dam, *supra* n. 23, at 19.

[34] Of course, the Sherman Act does not prohibit "tying"; it prohibits "contract[s] . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled "tying." If the competitive consequences of this arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.

to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.[35]

Unquestionably, the anesthesiological component of the package offered by the hospital could be provided separately and could be selected either by the individual patient or by one of the patient's doctors if the hospital did not insist on including anesthesiological services in the package it offers to its customers. As a matter of actual practice, anesthesiological services are billed separately from the hospital services petitioners provide. There was ample and uncontroverted testimony that patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia, and that the choice of an individual anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's specialty, obstetric anesthesiology.[36] The Dis-

[35] This approach is consistent with that taken by a number of lower courts. See *Moore* v. *Jas. H. Matthews & Co.*, 550 F. 2d 1207, 1214–1215 (CA9 1977); *Siegel* v. *Chicken Delight, Inc.*, 448 F. 2d 43, 48–49 (CA9 1971), cert. denied, 405 U. S. 955 (1972); *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F. 2d 248, 253 (CA4 1971); *Susser* v. *Carvel Corp.*, 332 F. 2d 505, 514 (CA2 1964), cert. dism'd, 381 U. S. 125 (1965); *United States* v. *Mercedes-Benz of North America, Inc.*, 517 F. Supp. 1369, 1379–1381 (ND Cal. 1981); *In re Data General Corp. Antitrust Litigation*, 490 F. Supp. 1089, 1104–1110 (ND Cal. 1980); *Jones* v. *247 East Chestnut Properties*, 1975–2 Trade Cases ¶ 60,491, pp. 67,162–67,163 (ND Ill. 1974); *N. W. Controls, Inc.* v. *Outboard Marine Corp.*, 333 F. Supp. 493, 501–504 (Del. 1971); *Teleflex Industrial Products, Inc.* v. *Brunswick Corp.*, 293 F. Supp. 107, 109, and n. 6 (ED Pa. 1968). See generally Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963 (1974); Wheeler, Some Observations on Tie-ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries, 60 Calif. L. Rev. 1557, 1558–1567, 1572–1573 (1972); Note, Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws, 46 S. Cal. L. Rev. 160 (1972). See also *Fortner I*, 394 U. S., at 525 (Fortas, J., dissenting); Note, Tying Arrangements and the Single Product Issue, 31 Ohio St. L. J. 861 (1970).

[36] Testimony that patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request

trict Court found that "[t]he provision of anesthesia services is a medical service separate from the other services provided by the hospital." 513 F. Supp., at 540.[37] The Court of Appeals agreed with this finding, and went on to observe: "[A]n anesthesiologist is normally selected by the surgeon, rather than the patient, based on familiarity gained through a working relationship. Obviously, the surgeons who practice at East Jefferson Hospital do not gain familiarity with any anesthesiologists other than Roux and Associates." 686 F. 2d, at 291.[38] The record amply supports the conclusion that consumers differentiate between anesthesiological services and the other hospital services provided by petitioners.[39]

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specific anesthesiologists, was provided by Dr. Roux, Tr. 17, 20 (May 15, 1980, afternoon session), Dr. Hyde, *id.*, at 68–69, 72–74 (May 16, 1980), and other anesthesiologists as well, see *id.*, at 64, 87–88 (May 15, 1980, afternoon session) (testimony of Dr. Charles Eckert); *id.*, at 25–30, 33–34 (May 16, 1980) (testimony of Dr. John Adriani). There was no testimony that patients or their surgeons do not differentiate between anesthesiological services and hospital services when making purchasing decisions. As a statistical matter, only 27 percent of anesthesiologists have financial relationships with hospitals. American Medical Association, Socioeconomic Characteristics of Medical Practice: 1983, p. 12 (1983). In this respect anesthesiologists may differ from radiologists, pathologists, and other types of hospital-based physicians (HBPs). "In some respects anesthesiologists are more akin to office-based MDs (particularly surgeons) than other HBPs. Anesthesiologists' outputs are more discrete, and these HBPs are predominantly fee-for-service practitioners who directly provide services to patients." Steinwald, Hospital-Based Physicians: Current Issues and Descriptive Evidence, Health Care Financing Rev. 63, 69 (Summer 1980). See also *United States* v. *American Society of Anesthesiologists, Inc.*, 473 F. Supp. 147, 150 (SDNY 1979) ("By 1957 the salaried anesthesiologist had become the exception. Anesthesiologists began to establish independent practices and were able to obtain hospital privileges upon the same terms and conditions as other clinicians").

[37] Accordingly, in its conclusions of law the District Court treated the case as involving a tying arrangement. 513 F. Supp., at 542.

[38] Petitioners do not challenge these findings of the District Court and the Court of Appeals.

[39] One of the most frequently cited statements on this subject was made by Judge Van Dusen in *United States* v. *Jerrold Electronics Corp.*, 187

Thus, the hospital's requirement that its patients obtain necessary anesthesiological services from Roux combined the purchase of two distinguishable services in a single transaction.[40] Nevertheless, the fact that this case involves a re-

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F. Supp. 545 (ED Pa. 1960), aff'd, 365 U. S. 567 (1961) *(per curiam)*. While this statement was specifically made with respect to § 3 of the Clayton Act, 15 U. S. C. § 14, its analysis is also applicable to § 1 of the Sherman Act, since with respect to the definition of tying the standards used by the two statutes are the same. See *Times-Picayune*, 345 U. S., at 608–609.

"There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered all of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum for the total system. Finally, while Jerrold had cable and antennas to sell which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it." 187 F. Supp., at 559.

The record here shows that other hospitals often permit anesthesiological services to be purchased separately, that anesthesiologists are not fungible in that the services provided by each are not precisely the same, that anesthesiological services are billed separately, and that the hospital required purchases from Roux even though other anesthesiologists were available and Roux had no objection to their receiving staff privileges at East Jefferson. Therefore, the *Jerrold* analysis indicates that there was a tying arrangement here. *Jerrold* also indicates that tying may be permissible when necessary to enable a new business to break into the market. See *id.*, at 555–558. Assuming this defense exists, and assuming it justified the 1971 Roux contract in order to give Roux an incentive to go to work at a new hospital with an uncertain future, that justification is inapplicable to the 1976 contract, since by then Roux was willing to continue to service the hospital without a tying arrangement.

[40] This is not to say that § 1 of the Sherman Act gives a purchaser the right to buy a product that the seller does not wish to offer for sale. A grocer may decide to carry four brands of cookies and no more. If the customer wants a fifth brand, he may go elsewhere but he cannot sue the grocer even if there is no other in town. However, in such a case the cus-

quired purchase of two services that would otherwise be purchased separately does not make the Roux contract illegal. As noted above, there is nothing inherently anticompetitive about packaged sales. Only if patients are forced to purchase Roux's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of Roux.[41] The fact that petitioners' patients are required to purchase two separate items is only the beginning of the appropriate inquiry.[42]

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tomer is free to purchase no cookies at all, while buying other needed food. If the grocer required the customer to buy an unwanted brand of cookies in order to buy other items which the customer needs and cannot readily obtain elsewhere, then a tying question arises. Cf. *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 7 (grocer selling flour can require customers to also buy sugar only "if its competitors were ready and able to sell flour by itself"). Here, the question is whether patients are forced to use an unwanted anesthesiologist in order to obtain needed hospital services.

[41] An examination of the reason or reasons why petitioners denied respondent staff privileges will not provide the answer to the question whether the package of services they offered to their patients is an illegal tying arrangement. As a matter of antitrust law, petitioners may give their anesthesiology business to Roux because he is the best doctor available, because he is willing to work long hours, or because he is the son-in-law of the hospital administrator without violating the *per se* rule against tying. Without evidence that petitioners are using market power to force Roux upon patients there is no basis to view the arrangement as unreasonably restraining competition whatever the reasons for its creation. Conversely, with such evidence, the *per se* rule against tying may apply. Thus, we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care.

[42] Petitioners argue and the District Court found that the exclusive contract had what it characterized as procompetitive justifications in that an exclusive contract ensures 24-hour anesthesiology coverage, enables flexible scheduling, and facilitates work routine, professional standards, and maintenance of equipment. The Court of Appeals held these findings to be clearly erroneous since the exclusive contract was not necessary to

IV

The question remains whether this arrangement involves the use of market power to force patients to buy services they would not otherwise purchase. Respondent's only basis for invoking the *per se* rule against tying and thereby avoiding analysis of actual market conditions is by relying on the preference of persons residing in Jefferson Parish to go to East Jefferson, the closest hospital. A preference of this kind, however, is not necessarily probative of significant market power.

Seventy percent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson. 513 F. Supp., at 539. Thus East Jefferson's "dominance" over persons residing in Jefferson Parish is far from overwhelming.[43] The

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achieve these ends. Roux was willing to provide 24-hour coverage even without an exclusive contract and the credentials committee of the hospital could impose standards for staff privileges that would ensure staff would comply with the demands of scheduling, maintenance, and professional standards. 686 F. 2d, at 292. In the past, we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved. See *Arizona* v. *Maricopa Medical Society*, 457 U. S., at 348–351; *National Gerimedical Hospital* v. *Blue Cross*, 452 U. S. 378 (1981); *American Medical Assn.* v. *United States*, 317 U. S. 519, 528–529 (1943). Petitioners seek no special solicitude. See n. 12, *supra*. We have also uniformly rejected similar "goodwill" defenses for tying arrangements, finding that the use of contractual quality specifications are generally sufficient to protect quality without the use of a tying arrangement. See *Standard Oil Co. of California* v. *United States*, 337 U. S., at 305–306; *International Salt Co.* v. *United States*, 332 U. S., at 397–398; *International Business Machines Corp.* v. *United States*, 298 U. S., at 138–140. See generally Comment, Tying Arrangements under the Antitrust Laws: The "Integrity of the Product" Defense, 62 Mich. L. Rev. 1413 (1964). Since the District Court made no finding as to why contractual quality specifications would not protect the hospital, there is no basis for departing from our prior cases here.

[43] In fact its position in this market is not dissimilar from the market share at issue in *Times-Picayune*, which the Court found insufficient as a basis for inferring market power. See 345 U. S., at 611–613. Moreover,

fact that a substantial majority of the parish's residents elect not to enter East Jefferson means that the geographic data do not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions. The Court of Appeals acknowledged as much; it recognized that East Jefferson's market share alone was insufficient as a basis to infer market power, and buttressed its conclusion by relying on "market imperfections" [44] that permit petitioners to charge noncompetitive prices for hospital services: the prevalence of third-party payment for health care costs reduces price competition, and a lack of adequate information renders consumers unable to evaluate the quality of the medical care provided by competing hospitals. 686 F. 2d, at 290.[45] While these factors may generate "market power" in some abstract sense,[46] they do not generate the kind of market power that justifies condemnation of tying.

Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. A lack of price or quality

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in other antitrust contexts this Court has found that market shares comparable to that present here do not create an unacceptable likelihood of anticompetitive conduct. See *United States* v. *Connecticut National Bank*, 418 U. S. 656 (1974); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

[44] The Court of Appeals acknowledged that absent these market imperfections, there was no basis for applying the *per se* rule against tying. "The contract at issue here involved only one hospital out of at least twenty in the area. Under the analysis applied to a truly competitive market, appellant has failed to prove an illegal tying arrangement." 686 F. 2d, at 290.

[45] Congress has found these market imperfections to exist. See *National Gerimedical Hospital* v. *Blue Cross*, 452 U. S., at 388, n. 13, 391–393, and n. 18; 42 U. S. C. §§ 300k, 300k–2(b); H. R. Conf. Rep. No. 96–420, pp. 57–58 (1979); S. Rep. No. 96–96, pp. 52–53 (1979).

[46] As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market. See *Fortner II*, 429 U. S., at 620; *Fortner I*, 394 U. S., at 503–504.

competition does not create this type of forcing. If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want—their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement—such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."

Thus, neither of the "market imperfections" relied upon by the Court of Appeals forces consumers to take anesthesiological services they would not select in the absence of a tie. It is safe to assume that every patient undergoing a surgical operation needs the services of an anesthesiologist; at least this record contains no evidence that the hospital "forced" any such services on unwilling patients.[47] The record therefore

[47] Nor is there an indication in the record that petitioners' practices have increased the social costs of their market power. Since patients' anesthesiological needs are fixed by medical judgment, respondent does not argue that the tying arrangement facilitates price discrimination. Where variable-quantity purchasing is unavailable as a means to enable price discrimination, commentators have seen less justification for condemning tying. See Dam, *supra* n. 23, at 15–17; Turner, *supra* n. 21, at 67–72. While tying arrangements like the one at issue here are unlikely to be used to facilitate price discrimination, they could have the similar effect of enabling hospitals "to evade price control in the tying product through clandestine transfer of the profit to the tied product. . . ." *Fortner I*, 394 U. S., at 513 (WHITE, J., dissenting). Insurance companies are the principal source of price restraint in the hospital industry; they place some limitations on the ability of hospitals to exploit their market power. Through this arrangement, petitioners may be able to evade that restraint by obtaining a portion of the anesthesiologists' fees and therefore realize a greater return than they could in the absence of the arrangement. This could also have an adverse effect on the anesthesiology market since it is possible that only less able anesthesiologists would be willing to give up

does not provide a basis for applying the *per se* rule against tying to this arrangement.

V

In order to prevail in the absence of *per se* liability, respondent has the burden of proving that the Roux contract violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists. This competition takes place in a market that has not been defined. The market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts such as the Roux contract and might be statewide or merely local.[42] There is, however, insufficient evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained compe-

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part of their fees in return for the security of an exclusive contract. However, there are no findings of either the District Court or the Court of Appeals which indicate that this type of exploitation of market power has occurred here. The Court of Appeals found only that Roux's use of nurse anesthetists increased its and the hospital's profits, but there was no finding that nurse anesthetists might not be used with equal frequency absent the exclusive contract. Indeed, the District Court found that nurse anesthetists are utilized in all hospitals in the area. 513 F. Supp., at 537, 543. Moreover, there is nothing in the record which details whether this arrangement has enhanced the value of East Jefferson's market power or harmed quality competition in the anesthesiology market.

[42] While there was some rather impressionistic testimony that the prevalence of exclusive contracts tended to discourage young doctors from entering the market, the evidence was equivocal and neither the District Court nor the Court of Appeals made any findings concerning the contract's effect on entry barriers. Respondent does not press the point before this Court. It is possible that under some circumstances an exclusive contract could raise entry barriers since anesthesiologists could not compete for the contract without raising the capital necessary to run a hospitalwide operation. However, since the hospital has provided most of the capital for the exclusive contractor in this case, that problem does not appear to be present.

tition. The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist.[49] The evidence indicates that some surgeons and patients preferred respondent's services to those of Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.[50]

In sum, all that the record establishes is that the choice of anesthesiologists at East Jefferson has been limited to one of the four doctors who are associated with Roux and therefore have staff privileges.[51] Even if Roux did not have an exclusive contract, the range of alternatives open to the patient would be severely limited by the nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges. If respondent is admitted to the staff of East Jefferson, the range of choice will be enlarged from

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[49] While it is true that purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, so that competition may be impeded, see n. 24, *supra*, this depends on an empirical demonstration concerning the effect of the arrangement on price or quality, and the record reveals little if anything about the effect of this arrangement on the market for anesthesiological services.

[50] If, as is likely, it is the patient's doctor and not the patient who selects an anesthesiologist, the doctor can simply take the patient elsewhere if he is dissatisfied with Roux. The District Court found that most doctors in the area have staff privileges at more than one hospital. 513 F. Supp., at 541.

[51] The effect of the contract, of course, has been to remove the East Jefferson Hospital from the market open to Roux's competitors. Like any exclusive-requirements contract, this contract could be unlawful if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services. See generally *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961); *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949). However, respondent has not attempted to make this showing.

four to five doctors, but the most significant restraints on the patient's freedom to select a specific anesthesiologist will nevertheless remain.[52] Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made.

VI

Petitioners' closed policy may raise questions of medical ethics,[53] and may have inconvenienced some patients who would prefer to have their anesthesia administered by someone other than a member of Roux & Associates, but it does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that this Court has branded unlawful. There is no evidence that the price, the quality, or the supply or demand for either the "tying product" or the "tied product" involved in this case has been adversely affected by the exclusive contract between Roux and the hospital. It may well be true that the contract made it necessary for Dr. Hyde and others to practice elsewhere, rather than at East Jefferson. But there has been no showing that the market as a whole has been affected at all by the contract. Indeed, as we previously noted, the record tells us very little about the market for the services of an-

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[52] The record simply tells us little if anything about the effect of this arrangement on price or quality of anesthesiological services. As to price, the arrangement did not lead to an increase in the price charged to the patient. 686 F. 2d, at 291. As to quality, the record indicates little more than that there have never been any complaints about the quality of Roux's services, and no contention that his services are in any respect inferior to those of respondent. Moreover, the self-interest of the hospital, as well as the ethical and professional norms under which it operates, presumably protect the quality of anesthesiological services. See Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals 3–10, 151–154 (1983).

[53] See App. A to Brief for American Society of Anesthesiologists, Inc., as *Amicus Curiae*.

esthesiologists. Yet that is the market in which the exclusive contract has had its principal impact. There is simply no showing here of the kind of restraint on competition that is prohibited by the Sherman Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.[54]

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

As the opinion for the Court demonstrates, we have long held that tying arrangements are subject to evaluation for *per se* illegality under § 1 of the Sherman Act. Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress. See *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 769 (1984) (BRENNAN, J., concurring). I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

East Jefferson Hospital, a public hospital governed by petitioners, requires patients to use the anesthesiological services provided by Roux & Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital. The Court of Appeals found that this arrangement was a tie-in illegal under the Sherman Act. 686 F. 2d 286

[54] The claims raised by respondent but not passed upon by the Court of Appeals remain open on remand. See n. 2, *supra*.

(CA5 1982). I concur in the Court's decision to reverse but write separately to explain why I believe the hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the hospital and certain anesthesiologists, is properly analyzed under the rule of reason.

I

Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the *tying* product, sugar as the *tied* product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of general hospital services and operating room facilities (the tying service) to the sale of anesthesiologists' services (the tied services). The Court has on occasion applied a *per se* rule of illegality in actions alleging tying in violation of §1 of the Sherman Act. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947).

Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. See, *e. g.*, *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). In deciding whether an economic restraint should be declared illegal *per se*, "[t]he probability that anticompetitive consequences will result from a practice and the severity of those consequences [is] balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977). See also *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 351 (1982). Only when there is very little loss to society from banning a re-

straint altogether is an inquiry into its costs in the individual case considered to be unnecessary.

Some of our earlier cases did indeed declare that tying arrangements serve "hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305–306 (1949) (dictum). However, this declaration was not taken literally even by the cases that purported to rely upon it. In practice, a tie has been illegal only if the seller is shown to have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." *Northern Pacific R. Co.*, 356 U. S., at 6. Without "control or dominance over the tying product," the seller could not use the tying product as "an effectual weapon to pressure buyers into taking the tied item," so that any restraint of trade would be "insignificant." *Ibid.* The Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect.

The *"per se"* doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.[1] As a result, tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the tying context has generated more confusion

[1] This inquiry has been required in analyzing both the prima facie case and affirmative defenses. Most notably, *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 559–560 (ED Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961), upheld a requirement that buyers of television systems purchase the complete system, as well as installation and repair service, on the grounds that the tie assured that the systems would operate and thereby protected the seller's business reputation.

than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis.

The time has therefore come to abandon the "*per se*" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever.[2] This change will rationalize rather than abandon tie-in doctrine as it is already applied.

II

Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied-product market, see *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 605 (1953), or that abet the harmful exercise of market power that the seller possesses in the tying product market.[3] Under the rule of reason tying arrangements should be disapproved only in such instances.

Market power in the *tying* product may be acquired legitimately (*e. g.*, through the grant of a patent) or illegitimately (*e. g.*, as a result of unlawful monopolization). In either event, exploitation of consumers in the market for the tying

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[2] Tying law is particularly anomalous in this respect because arrangements largely indistinguishable from tie-ins are generally analyzed under the rule of reason. For example, the "*per se*" analysis of tie-ins subjects restrictions on a franchisee's freedom to purchase supplies to a more searching scrutiny than restrictions on his freedom to sell his products. Compare, *e. g.*, *Siegel* v. *Chicken Delight, Inc.*, 448 F. 2d 43 (CA9 1971), cert. denied, 405 U. S. 955 (1972), with *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977). And exclusive contracts that, like tie-ins, require the buyer to purchase a product from one seller are subject only to the rule of reason. See *infra*, at 44–45.

[3] See n. 4, *infra*.

product is a possibility that exists and that may be regulated under § 2 of the Sherman Act without reference to any tying arrangements that the seller may have developed. The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the *tying* product. A seller with a monopoly on flour, for example, cannot increase the profit it can extract from flour consumers simply by forcing them to buy sugar along with their flour. Counterintuitive though that assertion may seem, it is easily demonstrated and widely accepted. See, *e. g.*, R. Bork, The Antitrust Paradox 372–374 (1978); P. Areeda, Antitrust Analysis 735 (3d ed. 1981).

Tying may be economically harmful primarily in the rare cases where power in the market for the tying product is used to create *additional* market power in the market for the *tied* product.[4] The antitrust law is properly concerned with

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[4]Tying might be undesirable in two other instances, but the hospital-Roux arrangement involves neither one.

In a regulated industry a firm with market power may be unable to extract a supercompetitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 513 (1969) (WHITE, J., dissenting).

Tying may also help the seller engage in price discrimination by "metering" the buyer's use of the tying product. Cf. *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947). Price discrimination may be independently unlawful, see 15 U. S. C. § 13. Price discrimination may, however, *decrease* rather than increase the economic costs of a seller's market power. See, *e. g.*, R. Bork, The Antitrust Paradox 398 (1978); P. Areeda, Antitrust Analysis 608–610 (3d ed. 1981); O. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 11–13 (1975). *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 617 (1977) *(Fortner II)*, did not hold that price discrimination in the form of a tie-in is always economically harmful; that case indicated only that price discrimination may indicate market power in the tying-product market. But there is no need in this case to address the problem of price discrimination facilitated by tying. The discussion herein is aimed only at tying arrangements as to which no price discrimination is alleged.

tying when, for example, the flour monopolist threatens to use its market power to acquire additional power in the sugar market, perhaps by driving out competing sellers of sugar, or by making it more difficult for new sellers to enter the sugar market. But such extension of market power is unlikely, or poses no threat of economic harm, unless the two markets in question and the nature of the two products tied satisfy three threshold criteria.[5]

First, the seller must have power in the tying-product market.[6] Absent such power tying cannot conceivably have any adverse impact in the tied-product market, and can be only procompetitive in the tying-product market.[7] If the

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[5] Wholly apart from market characteristics, a prerequisite to application of the Sherman Act is an effect on interstate commerce. See, *e. g.*, *McLain* v. *Real Estate Board of New Orleans*, 444 U. S. 232, 246 (1980); *Burke* v. *Ford*, 389 U. S. 320, 322 (1967). It is not disputed that such an impact is present here.

[6] The Court has failed in the past to define how much market power is necessary, but in the context of this case it is inappropriate to attempt to resolve that question. In *International Salt Co.* v. *United States*, *supra*, the Court assumed that a patent conferred market power and therefore sufficiently established "the tendency of the arrangement to accomplishment of monopoly." *Id.*, at 396. In its next tying case, *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), the Court distinguished *International Salt* in part by finding that there was no market "dominance," 345 U. S., at 610–613, after a careful consideration of the relevant market. Then, in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6–8, 11 (1958), the Court required only a minimal showing of market power. More recently, in *Fortner II*, *supra*, the Court conducted a more extensive analysis of whether the tie was actually an exercise of market power, considering such factors as the size and profitability of the firm seeking to impose the tie, the character of the tying product, and the effects of the tie—the price charged for the products, the number of customers affected, the functional relation between the tied and tying product.

[7] A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market

seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well. See *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 620 (1977) *(Fortner II); Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 503–504 (1969) *(Fortner I); United States* v. *Loew's Inc.*, 371 U. S. 38, 45, 48, n. 5 (1962); *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 6–7.

Second, there must be a substantial threat that the tying seller will acquire market power in the tied-product market. No such threat exists if the tied-product market is occupied by many stable sellers who are not likely to be driven out by the tying, or if entry barriers in the tied-product market are low. If, for example, there is an active and vibrant market for sugar—one with numerous sellers and buyers who do not deal in flour—the flour monopolist's tying of sugar to flour need not be declared unlawful. Cf. *Fortner II*, *supra*, at 617–618, and n. 8; *Fortner I*, *supra*, at 498–499; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S., at 611; *Standard Oil Co. of California* v. *United States*, 337 U. S., at 305–306; *International Salt Co.* v. *United States*, 332

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power only if the market is properly defined to include all reasonable substitutes for the product. See generally Landes & Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981).

Nor does any presumption of market power find support in our prior cases. Although *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948), considered the legality of "block-booking" of motion pictures, which ties the purchase of rights to copyrighted motion pictures to purchase of other motion pictures of the same copyright holder, the Court did not analyze the arrangement with the schema of the tying cases. Rather, the Court borrowed the patent law principle of "patent misuse," which prevents the holder of a patent from using the patent to require his customers to purchase unpatented products. *Id.*, at 156–159. See, *e. g.*, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665 (1944). The "patent misuse" doctrine may have influenced the Court's willingness to strike down the arrangement at issue in *International Salt* as well, although the Court did not cite the doctrine in that case.

U. S., at 396. If, on the other hand, the tying arrangement is likely to erect significant barriers to entry into the tied-product market, the tie remains suspect. *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 371 (1965).

Third, there must be a coherent economic basis for treating the tying and tied products as distinct. All but the simplest products can be broken down into two or more components that are "tied together" in the final sale. Unless it is to be illegal to sell cars with engines or cameras with lenses, this analysis must be guided by some limiting principle. For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*[8] When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together. If sugar is useless to consumers except when used with flour, the flour seller's market power is projected into the sugar market whether or not the two products are actually sold together; the flour seller can exploit what market power it has over flour with or without the tie.[9] The flour seller will therefore have little incentive to monopolize the sugar market unless it can produce and distribute sugar more cheaply than other sugar sellers. And in this unusual case, where flour is monopolized and sugar is useful only when

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[8] Whether the tying product is one that consumers might wish to purchase without the tied product should be irrelevant. Once it is conceded that the seller has market power over the tying product it follows that the seller can sell the tying product on noncompetitive terms. The injury to consumers does not depend on whether the seller chooses to charge a supercompetitive price, or charges a competitive price but insists that consumers also buy a product that they do not want.

[9] Cf. Areeda, *supra* n. 4, at 735; Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1010 (1974); Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21–23 (1957).

used with flour, consumers will suffer no further economic injury by the monopolization of the sugar market.

Even when the tied product does have a use separate from the tying product, it makes little sense to label a package as two products without also considering the economic justifications for the sale of the package as a unit. When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry. The lower courts largely have adopted this approach.[10] See, *e. g.*, *Foster* v. *Maryland State Savings and Loan Assn.*, 191 U. S. App. D. C. 226, 228–231, 590 F. 2d 928, 930–933 (1978), cert. denied, 439 U. S. 1071 (1979); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F. 2d 1307, 1330 (CA5 1976); *Kugler* v. *AAMCO Automatic Transmissions, Inc.*, 460 F. 2d 1214 (CA8 1972); *ILC Peripherals Leasing Corp.* v. *International Business Machines Corp.*, 448 F. Supp. 228, 230

[10] The examination of the economic advantages of tying may properly be conducted as part of the rule-of-reason analysis, rather than at the threshold of the tying inquiry. This approach is consistent with this Court's occasional references to the problem. The Court has not heretofore had occasion to set forth any general criteria for determining when two apparently separate products are components of a single product for tying analysis. In *Times-Picayune Publishing Co.*, the Court held that advertising space in a morning newspaper was the same product as advertising space in the evening newspaper—access to readership of the respective newspapers—because the subscribers had no reason to distinguish among the readers of the two papers. 345 U. S., at 613–616. In *Fortner I*, the Court, reversing the grant of a motion for summary judgment, rejected the contention that credit could never be separate from the product for whose purchase credit was extended. 394 U. S., at 506–507. The Court disclaimed any determination of "the standards for determining exactly when a transaction involves only a single product." *Id.*, at 507. These cases indicate that consideration of whether a buyer might prefer to purchase one component without the other is one of the factors in tying analysis and, more generally, that economic analysis rather than mere conventional separability into different markets should determine whether one or two products are involved in the alleged tie.

(ND Cal. 1978); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 563 (ED Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961).

These three conditions—market power in the tying product, a substantial threat of market power in the tied product, and a coherent economic basis for treating the products as distinct—are only threshold requirements. Under the rule of reason a tie-in may prove acceptable even when all three are met. Tie-ins may entail economic benefits as well as economic harms, and if the threshold requirements are met these benefits should enter the rule-of-reason balance.

> "[Tie-ins] may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962) . . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. . . . [Citing] *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (C. A. 7th Cir. 1935), aff'd, 299 U. S. 3 (1936). And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution." *Fortner I*, 394 U. S., at 514, n. 9 (WHITE, J., dissenting).

The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to "force" the buyer to purchase the tied product. For when the seller exerts market power only in the tying-product market, it makes no difference to him or his customers whether he exploits that power by rais-

ing the price of the tying product or by "forcing" customers to buy a tied product. See Markovits, Tie-Ins, Reciprocity and the Leverage Theory, 76 Yale L. J. 1397, 1397–1398 (1967); Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62, 62–63 (1960). On the other hand, tying may make the provision of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.

III

Application of these criteria to the case at hand is straightforward.

Although the issue is in doubt, we may assume that the hospital does have market power in the provision of hospital services in its area. The District Court found to the contrary, 513 F. Supp. 532, 541 (ED La. 1981), but the Court of Appeals determined that the hospital does possess market power in an appropriately defined market. While appellate courts should normally defer to the district courts' findings on such fact-bound questions,[11] I shall assume for the purposes of this discussion that the Court of Appeals' determination that the hospital does have some power in the provision of hospital services in its local market is accepted.

Second, in light of the hospital's presumed market power, we may also assume that there is a substantial threat that East Jefferson will acquire market power over the provision of anesthesiological services in its market. By tying the sale of anesthesia to the sale of other hospital services the hospital can drive out other sellers of those services who might otherwise operate in the local market. The hospital may thus gain local market power in the provision of anesthesiology: anesthesiological services offered in the hospital's market, narrowly defined, will be purchased only from Roux, under the hospital's auspices.

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[11] See Fed. Rule Civ. Proc. 52(a); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 855–858 (1982).

But the third threshold condition for giving closer scrutiny to a tying arrangement is not satisfied here: there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services,[12] so the hospital can acquire no *additional* market power by selling the two services together. Accordingly, the link between the hospital's services and anesthesia administered by Roux will affect neither the amount of anesthesia provided nor the combined price of anesthesia and surgery for those who choose to become the hospital's patients. In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.

Even if they are, the tying should not be considered a violation of § 1 of the Sherman Act because tying here cannot increase the seller's already absolute power over the volume of production of the tied product, which is an inevitable consequence of the fact that very few patients will choose to undergo surgery without receiving anesthesia. The hospital-Roux contract therefore has little potential to harm the patients. On the other side of the balance, the District Court found, and the Court of Appeals did not dispute, that the tie-in conferred significant benefits upon the hospital and the patients that it served.

The tie-in improves patient care and permits more efficient hospital operation in a number of ways. From the viewpoint of hospital management, the tie-in ensures 24-hour anesthesiology coverage, aids in standardization of procedures and efficient use of equipment, facilitates flexible scheduling of operations, and permits the hospital more effectively to monitor the quality of anesthesiological services. Further, the tying arrangement is advantageous to patients because, as the District Court found, the closed anesthesiology depart-

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[12] While the record appears to be devoid of factual findings on this point the assumption is a safe one, and certainly one that finds no contradiction in the record.

ment places upon the hospital, rather than the individual patient, responsibility to select the physician who is to provide anesthesiological services. The hospital also assumes the responsibility that the anesthesiologist will be available, will be acceptable to the surgeon, and will provide suitable care to the patient. In assuming these responsibilities—responsibilities that a seriously ill patient frequently may be unable to discharge—the hospital provides a valuable service to its patients. And there is no indication that patients were dissatisfied with the quality of anesthesiology that was provided at the hospital or that patients wished to enjoy the services of anesthesiologists other than those that the hospital employed. Given this evidence of the advantages and effectiveness of the closed anesthesiology department, it is not surprising that, as the District Court found, such arrangements are accepted practice in the majority of hospitals of New Orleans and in the health care industry generally. Such an arrangement, which has little anticompetitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn.[13] This conclusion reaffirms our threshold determination that the joint provision of hospital services and anesthesiology should not be viewed as involving a tie between distinct products, and therefore should require no additional scrutiny under the antitrust law.

IV

Whether or not the hospital-Roux contract is characterized as a tie between distinct products, the contract unquestionably does constitute exclusive dealing. Exclusive-dealing arrangements are independently subject to scrutiny under § 1 of the Sherman Act, and are also analyzed under the rule of

[13] The Court of Appeals disregarded the benefits of the tie because it found that there were less restrictive means of achieving them. In the absence of an adequate basis to expect any harm to competition from the tie-in, this objection is simply irrelevant.

reason. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 333–335 (1961).

The hospital-Roux arrangement could conceivably have an adverse effect on horizontal competition among anesthesiologists, or among hospitals. Dr. Hyde, who competes with the Roux anesthesiologists, and other hospitals in the area, who compete with East Jefferson, may have grounds to complain that the exclusive contract stifles horizontal competition and therefore has an adverse, albeit indirect, impact on consumer welfare even if it is not a tie.

Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply. In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question—the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949). When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat of adverse economic consequences. To the contrary, they may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships.

At issue here is an exclusive-dealing arrangement between a firm of four anesthesiologists and one relatively small hos-

pital. There is no suggestion that East Jefferson Hospital is likely to create a "bottleneck" in the availability of anesthesiologists that might deprive other hospitals of access to needed anesthesiological services, or that the Roux associates have unreasonably narrowed the range of choices available to other anesthesiologists in search of a hospital or patients that will buy their services. Cf. *Associated Press* v. *United States*, 326 U. S. 1 (1945). A firm of four anesthesiologists represents only a very small fraction of the total number of anesthesiologists whose services are available for hire by other hospitals, and East Jefferson is one among numerous hospitals buying such services. Even without engaging in a detailed analysis of the size of the relevant markets we may readily conclude that there is no likelihood that the exclusive-dealing arrangement challenged here will either unreasonably enhance the hospital's market position relative to other hospitals, or unreasonably permit Roux to acquire power relative to other anesthesiologists. Accordingly, this exclusive-dealing arrangement must be sustained under the rule of reason.

V

For these reasons I conclude that the hospital-Roux contract does not violate § 1 of the Sherman Act. Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of service.

Whether or not this case involves tying of distinct products, the hospital-Roux contract is subject to scrutiny under the rule of reason as an exclusive-dealing arrangement. Plainly, however, the arrangement forecloses only a small

fraction of the markets in which anesthesiologists may sell their services, and a still smaller fraction of the market in which hospitals may secure anesthesiological services. The contract therefore survives scrutiny under the rule of reason.

The judgment of the Court of Appeals for the Fifth Circuit should be reversed, and the case should be remanded for any further proceedings on respondent's remaining claims. See *ante*, at 5, n. 2.

ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* McMILLAN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–1295. Argued January 10, 1984—Decided March 27, 1984

Appellee black voters of Escambia County, Fla., filed suit in Federal District Court, alleging that the at-large system for electing County Commissioners, by diluting appellees' voting strength, violated various federal constitutional and statutory provisions. The court entered judgment for appellees, holding that the election system violated, *inter alia*, the Fourteenth Amendment and the Voting Rights Act of 1965. The Court of Appeals affirmed on the ground that the election system violated the Fourteenth Amendment, but did not review the District Court's conclusion as to the violation of the Voting Rights Act. This appeal presented the question whether the evidence of discriminatory intent in the record was adequate to support the District Court's finding that the at-large system violated the Fourteenth Amendment.

Held: Normally this Court will not decide a constitutional question if there is some other ground upon which to dispose of the case. The parties have not briefed the question whether the Voting Rights Act provided grounds for affirmance of the District Court's judgment, and, in any event, the question should be decided in the first instance by the Court of Appeals. Therefore, the proper course is to vacate the Court of Appeals' judgment and remand the case to that court for consideration of the statutory question.

688 F. 2d 960, vacated and remanded.

Charles S. Rhyne argued the cause for appellants. With him on the briefs were *J. Lee Rankin*, *Thomas D. Silverstein*, *Thomas R. Santurri*, and *Paula G. Drummond*.

Larry T. Menefee argued the cause for appellees. With him on the briefs were *James U. Blacksher*, *Jack Greenberg*, *Eric Schnapper*, and *Kent Spriggs*.*

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*Briefs of *amicus curiae* urging affirmance were filed for the American Civil Liberties Union by *Laughlin McDonald*, *Neil Bradley*, *Christopher Coates*, *Burt Neuborne*, and *E. Richard Larson*; and for the Lawyers'

PER CURIAM.

This appeal presents questions as to the appropriate standards of proof and appropriate remedy in suits that allege a violation of voting rights secured by the Fourteenth Amendment. We do not reach these questions, however, as it appears that the judgment under review may rest alternatively upon a statutory ground of decision.

I

Appellees, black voters of Escambia County, Fla., filed suit in the District Court, alleging that the at-large system for electing the five members of the Board of County Commissioners violated appellees' rights under the First, Thirteenth, Fourteenth, and Fifteenth Amendments, the Civil Rights Act of 1957, 71 Stat. 637, as amended, 42 U. S. C. § 1971(a)(1), and the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973.[1] Appellees contended that the at-large system operated to "dilute" their voting strength. See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 616–617 (1982).

The District Court entered judgment for appellees. That court found that the at-large system used by the county discriminated against black voters and had been retained at least in part for discriminatory purposes. The court concluded that the system violated appellees' rights under the Fourteenth and Fifteenth Amendments and the Voting Rights Act. The District Court ordered that the five commissioners be elected from single-member districts.

The Court of Appeals affirmed the District Court's judgment, concluding that the at-large election system violated the Fourteenth Amendment and that the District Court's

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Committee for Civil Rights Under Law by *Fred N. Fishman*, *Robert H. Kapp*, *Norman Redlich*, *William L. Robinson*, and *Frank R. Parker*.

[1] Defendants named in the suit were Escambia County, the Board of County Commissioners and its individual members, and the County Supervisor of Elections. Only former and present individual members of the Board are now before the Court as appellants. See n. 4, *infra*.

remedy was appropriate.[2] 688 F. 2d 960 (1982). As the finding of a Fourteenth Amendment violation was adequate to support the District Court's judgment, the Court of Appeals did not review the District Court's conclusion that the at-large system also violated the Fifteenth Amendment and the Voting Rights Act.[3] *Id.*, at 961, n. 2.

We noted probable jurisdiction, 460 U. S. 1080 (1983).[4]

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[2] The Court of Appeals initially had reversed the District Court's judgment. The Court of Appeals had found, under this Court's decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), that claims of "vote dilution" were not cognizable under the Fifteenth Amendment or the Voting Rights Act and that the evidence of discriminatory intent was insufficient to demonstrate a violation of the Fourteenth Amendment. 638 F. 2d 1239 (1981). After this Court decided *Rogers* v. *Lodge*, 458 U. S. 613 (1982), the Court of Appeals granted appellees' petition for rehearing and reversed its judgment on Fourteenth Amendment grounds. 688 F. 2d 960 (1982). The Court of Appeals concluded, in light of *Rogers*, that the District Court's findings as to the discriminatory effects and purposes of the at-large system were not "clearly erroneous." 688 F. 2d, at 969.

[3] The Court of Appeals vacated its first opinion, see n. 2, *supra*, that had considered questions under the Fifteenth Amendment and the Voting Rights Act. 688 F. 2d, at 961. Reconsideration of these grounds for relief on the petition for rehearing would have further delayed decision of the case, because appellants had not had an opportunity to brief the questions raised by Congress' recent amendment of the Voting Rights Act, see *infra*, at 51.

[4] Appellees move to dismiss on the grounds that no proper appellants are before the Court. The Board of County Commissioners itself has voted to dismiss the appeal. Aside from the two present Commissioners who dissented from this vote, several former Commissioners, who lost their seats in the subsequent court-ordered election, remain before the Court. Contrary to appellees' contention, the former Commissioners were not automatically dismissed as appellants when they left office, and the jurisdictional statement did not limit them to participation in the appeal in their "official capacity." Juris. Statement 1. Appellees have not suggested that the appeal is moot as to the issues of liability or that appellants have no live interest in the controversy.

Appellees do contend that the issue of appropriate remedy is moot, a contention that we need not reach in light of our disposition of the case. See n. 6, *infra*. Nor need we reach appellees' contention that the case is

II

This appeal presents the question whether the evidence of discriminatory intent in the record before the District Court was adequate to support the finding that the at-large system violated the Fourteenth Amendment. We decline to decide this question. As the Court of Appeals noted, the District Court's judgment rested alternatively upon the Voting Rights Act. See 688 F. 2d, at 961, n. 2; App. to Juris. Statement 101a. Moreover, the 1982 amendments to that Act, Pub. L. 97–205, § 3, 96 Stat. 134, 42 U. S. C. § 1973(b),[5] were not before the Court of Appeals. Affirmance on the statutory ground would moot the constitutional issues presented by the case. It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case. See *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

The parties have not briefed the statutory question, and, in any event, that question should be decided in the first in-

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not a proper appeal, a contention that may involve difficult questions of Florida law, as we would in any event treat the jurisdictional statement as a petition for certiorari, grant that petition, and dispose of the case as we do today. See 28 U. S. C. § 2103; *El Paso* v. *Simmons*, 379 U. S. 497, 501–503 (1965).

[5] As amended, § 1973 provides in part:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color . . . .

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . ."

stance by the Court of Appeals. We conclude, therefore, that the proper course is to vacate the judgment of the Court of Appeals, and remand the case to that court for consideration of the question whether the Voting Rights Act provides grounds for affirmance of the District Court's judgment.[6]

It is so ordered.

JUSTICE BLACKMUN, while joining the Court's *per curiam* opinion, would disallow costs in this case.

JUSTICE MARSHALL, dissenting.

Contrary to appellants' contention,[1] the Court of Appeals for the Fifth Circuit did not invalidate Art. VIII, § 1(e), of the Florida Constitution, which generally requires county commissioners to be elected at large. Rather, the Court of Appeals merely affirmed the District Court's finding that the Escambia County Commissioners refused to exercise certain powers with which they were invested by the State Constitution[2] in order to maintain, for racially discriminatory purposes, an at-large voting scheme that drastically diluted the political strength of Negro voters. See 688 F. 2d 960, 969 (1982). Because the Court of Appeals did not invalidate any state law, consideration of this case as an appeal under 28

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[6] Because questions of liability remain to be considered, we need not reach the issue whether the District Court's remedial order was proper under *Wise* v. *Lipscomb*, 437 U. S. 535 (1978), and *McDaniel* v. *Sanchez*, 452 U. S. 130 (1981).

[1] See Juris. Statement 2–3.

[2] The Florida Constitution empowers a county to change its electoral scheme from at-large voting to selection on the basis of single-member districts. See Fla. Const., Art. VIII, § 1(c); Fla. Stat. §§ 125.60–125.64 (1983). Such a change must be ratified by the majority of voters within a county. The District Court found that the Escambia County Commission refused to permit the electorate to vote on proposals to establish a single-member district voting scheme because of the Commissioners' racially discriminatory intent to maintain a voting system that nullified the political potential of Negro voters. See App. to Juris. Statement 96a–98a.

U. S. C. § 1254(2) is clearly improper. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 247 (1984); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 42–43 (1983) (statutes authorizing appeals are to be strictly construed). Consequently, appellants' jurisdictional statement must be treated as a petition for certiorari. So treated, I believe that the petition should be denied. The holding below falls squarely within applicable constitutional standards and raises no issues warranting this Court's attention. In sum, I would hold that appellants cannot properly invoke this Court's appellate jurisdiction and that their jurisdictional statement, considered as a petition for certiorari, should be be dismissed as improvidently granted.

I respectfully dissent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* SHELL OIL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82–825. Argued October 31, 1983—Decided April 2, 1984

Section 707(e) of Title VII of the Civil Rights Act of 1964 (Act) authorizes the Equal Employment Opportunity Commission (EEOC) "to investigate and act on a charge" that an employer has engaged in "a pattern or practice" of employment discrimination. Section 706(b) provides that such a charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires," and further requires the EEOC to "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the] employer . . . within ten days" of the filing of the charge. An implementing regulation provides that a charge of discrimination must "contain . . . [a] clear and concise statement of the facts, including the pertinent dates, constituting the alleged unlawful employment practices." A Commissioner of the EEOC issued a sworn charge against respondent employer, alleging that it had violated the Act by discriminating against Negroes and women in "recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment." The charge also specified the occupational categories access to which had been affected by the alleged discrimination. A copy of the charge was served on respondent 10 days after the charge was filed. Thereafter, respondent claimed that the charge was "not supportable by the facts," and when it persistently refused to provide the EEOC with certain requested records and data, the EEOC issued a subpoena *duces tecum*, directing respondent to turn over the information. Instead of complying with the subpoena, respondent filed suit in Federal District Court to quash the subpoena and enjoin the EEOC's investigation, alleging that the subpoena was unenforceable because the EEOC had failed to disclose facts sufficient to satisfy § 706(b)'s mandate. The charge was then amended to allege that respondent had engaged in the identified unlawful employment practices on a continuing basis from at least the effective date of the Act until the present. When respondent still refused to comply with the request for information, the EEOC filed suit in Federal District Court requesting enforcement of the subpoena, and this suit was consolidated with respondent's suit.

The District Court denied respondent relief and enforced the subpoena. The Court of Appeals reversed, holding that the EEOC had failed to comply with either § 706(b) or the implementing regulation, that the charge and notice should inform the employer of the approximate dates of the unlawful practices, should include enough other information to show that those dates have some "basis in fact," and should contain a "statement of the circumstances" of the alleged violations "supported by some factual or statistical basis."

Held: All of the strictures embodied in Title VII and the implementing regulation pertaining to the form and content of a charge of systemic discrimination and to the timing and adequacy of the notice afforded the employer were adhered to in this case, and therefore the EEOC was entitled to enforcement of its subpoena. Pp. 61–82.

(a) In determining the EEOC's authority to request judicial enforcement of its subpoenas, effect must be given to Congress' purpose in establishing a linkage between the EEOC's investigatory power and charges of discrimination. If the EEOC were able to insist that an employer obey a subpoena despite the complainant's failure to file a valid charge, Congress' desire to prevent the EEOC from exercising unconstrained investigative authority would be thwarted. Accordingly, the existence of a charge that meets the requirements of § 706(b) is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC. And, for purposes of this case, it is assumed that compliance with § 706(b)'s notice requirement is also a jurisdictional prerequisite to enforcement of a subpoena. Pp. 61–67.

(b) The prescription embodied in the implementing regulation, as applied to a charge alleging a "pattern or practice" of discrimination, should be construed as follows: Insofar as he is able, the Commissioner issuing the charge should identify the groups of persons that he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced. The charge issued here, as amended, plainly satisfied these standards. Pp. 67–74.

(c) The specific purpose of § 706(b)'s notice provision is to give an employer fair notice of the existence and nature of the allegations against it, and not to impose a substantive constraint on the EEOC's investigative authority. Properly construed, § 706(b) requires the EEOC, within 10 days of the filing of a charge, to reveal to the employer all of the information that must be included in the charge itself under the current version of the implementing regulation. Because in this case respondent was

provided with a copy of the charge 10 days after it was filed, and because the charge comported with the regulation, the notice provision was satisfied. Pp. 74–81.

676 F. 2d 322, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 82.

Richard G. Wilkins argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Philip B. Sklover*, and *Vella M. Fink*.

Robert E. Williams argued the cause for respondent. With him on the brief were *Douglas S. McDowell*, *Thomas R. Bagby*, *W. Stanley Walch*, *Charles A. Newman*, and *Steven J. Killworth*.*

JUSTICE MARSHALL delivered the opinion of the Court.

Section 707(e) of Title VII of the Civil Rights Act of 1964, as amended, authorizes the Equal Employment Opportunity Commission (EEOC) "to investigate and act on a charge" that an employer has engaged in "a pattern or practice" of employment discrimination. Section 706(b) and regulations promulgated thereunder govern the form and content of such a charge and the manner in which the employer should be notified of the allegations of wrongdoing contained therein. The question presented in this case is how much information must be included in the charge and provided to the employer before the Commission may secure judicial enforcement of an administrative subpoena compelling the employer to disclose personnel records and other material relevant to the charge.

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*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Cynthia Wicker* and *Stephan A. Bokat*; for the Equal Employment Advisory Council by *Lovic A. Brooks, Jr.*; and for the National Association of Manufacturers by *William E. Blasier* and *Douglas B. M. Ehlke*.

I

On September 27, 1979, Commissioner Eleanor Holmes Norton, then Chair of the EEOC, issued a sworn charge, alleging that respondent, Shell Oil Co., "has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment." App. to Pet. for Cert. 44a. The charge specified respondent's Wood River Refinery as the locale of the alleged statutory violations. In addition, the charge identified six occupational categories access to which had been affected by racial discrimination and seven occupational categories access to which had been affected by gender discrimination.[1] As originally drafted, the charge did not specify a date on which these alleged unlawful employment practices began. The charge was filed with the St. Louis District Office of the EEOC on October 16, 1979. A copy of the charge, accompanied by a cover letter and a request for various information from the personnel records of the Wood River Refinery, was served on respondent 10 days later.

In the course of discussions with the EEOC over the next several months, respondent took the position that "the charge that has been issued is not supportable by the facts." App. 91. In defense of that position, respondent identified a "multi-county area" surrounding the Wood River Refinery

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[1] The pertinent sections of the charge provided:

"More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

"1. Failing or refusing to recruit, hire, promote, train, assign or select Blacks for managerial, professional, technical, office/clerical, craft, and service worker positions because of their race.

"2. Failing or refusing to recruit, hire, promote, train, select, and assign females to managerial, professional, technical, craft, operative, laborer and service worker positions because of their sex." App. to Pet. for Cert. 44a.

that, in respondent's view, was the "appropriate local labor market for the Refinery." *Id.*, at 90. Respondent argued that, when the percentages of Negroes and women in the labor market so defined were compared to the percentages of Negroes and women in the overall work force of the refinery (and the percentages of Negroes and women who had recently been hired, promoted, or accepted into the refinery's training programs), it became apparent that respondent was not engaging in systemic discrimination. *Id.*, at 90–91.[2] Respondent submitted some aggregate employment statistics supportive of its arguments but refused to disclose the records and data requested by the EEOC unless and until the Commission answered a series of questions regarding the basis of the charge and furnished information substantiating its answers.

The EEOC took the position that, until it had more evidence, it could not evaluate respondent's contention that the proper labor market constituted not the St. Louis Standard Metropolitan Statistical Area but, rather, the smaller area proposed by respondent. *Id.*, at 95. In answer to respondent's arguments concerning the numbers of Negroes and women employed at the refinery, the EEOC referred respondent to § 16.2 of the EEOC Compliance Manual, which sets forth the standards the Commission has adopted for selecting employers suspected of engaging in systemic employment discrimination. One of the groups targeted for investigation under that provision consists of "employers . . . who employ a substantially smaller proportion of minorities and/or women in their higher paid job categories than in their lower paid job categories."[3] Respondent was thus alerted to the fact that its contentions based upon the percentages

[2] Respondent sought to buttress this argument by pointing out: "[T]here have been no race or sex discrimination charges filed against our facility in the last six years. Only two such charges have been filed in the last decade and both of those charges were dismissed." App. 89.

[3] EEOC Compliance Manual § 16.2(c) (1981). The same provision was contained in the 1979 version of the Manual.

of minorities and women in the aggregate work force of the refinery could not conclusively establish its compliance with the EEOC guidelines. On those bases, the EEOC rejected respondent's suggestion that the charge be withdrawn and reiterated the request for information from respondent's files.

When respondent persisted in its refusal to provide the requested data, the EEOC issued a subpoena *duces tecum*, directing respondent to turn over certain information pertaining to its employment practices from 1976 to the present. In accordance with Commission regulations, respondent petitioned the District Director of the EEOC to revoke or modify the subpoena. The District Director altered the subpoena in one minor respect, but otherwise denied relief. The General Counsel of the Commission upheld the decision of the District Director and ordered respondent to comply with the subpoena by September 18, 1980.

Instead of complying, respondent filed suit in the District Court for the Eastern District of Missouri to quash the subpoena and enjoin the Commission's investigation. Respondent alleged, *inter alia*, that the subpoena was unenforceable because the Commission had failed to disclose facts sufficient to satisfy the mandate of § 706(b) of Title VII, 86 Stat. 104, 42 U. S. C. § 2000e–5(b). Subsequently, Commissioner Norton amended the charge to allege that respondent "had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present."[4] When respondent still refused to comply with the requests for information, the Commission filed an action in the District

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[4] In explaining the amendment, Commissioner Norton averred that, in the original charge, she had "intended to cover all the unlawful employment practices identified therein occurring from July 2, 1965, continuing through at least the date of the charge," but that, in view of the recent decision of the Court of Appeals for the Ninth Circuit in *EEOC* v. *Dean Witter Co.*, 643 F. 2d 1334, 1338 (1980) (holding that the charge must contain a "good faith estimate of the probable time periods [involved]"), she thought it prudent to "clarify" the charge by including the date on which she suspected the wrongdoing began. App. to Pet. for Cert. 47a.

Court for the Southern District of Illinois seeking enforcement of the subpoena. That action was transferred to the District Court in Missouri and consolidated with the suit brought by respondent.

The District Court denied respondent's request to block the Commission's inquiry into respondent's records and enforced the subpoena. 523 F. Supp. 79 (ED Mo. 1981). The court reasoned that "[t]he purpose of a charge under section 706 . . . is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case." *Id.*, at 86. On that basis, the court rejected respondent's argument "that the Commissioner's charge does not specify sufficient facts." *Ibid.*[5]

A panel of the Court of Appeals reversed. 676 F. 2d 322 (CA8 1982). The court found that the EEOC had failed to comply with either the provisions of § 706(b) governing the specificity of the notice given an accused employer or the Commission's own regulations governing the contents of a charge. *Id.*, at 325. The court held that the charge and the notice thereof "should at least inform the employer of the approximate dates of the unlawful practices" and should include enough other information to show that those dates have "'some basis in fact.'" *Ibid.* (quoting *EEOC* v. *K–Mart Corp.*, 526 F. Supp. 121, 125 (ED Mich. 1981). In addition, the charge and notice should contain a "statement of the circumstances" of the alleged statutory violations "supported by some factual or statistical basis." 676 F. 2d, at 325–326.[6]

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[5] The District Court also rejected each of the other arguments advanced by respondent—*e. g.*, that the subpoena violated the Federal Reports Act, 44 U. S. C. § 3501 *et seq.*, and that the request for information was unduly burdensome. 523 F. Supp., at 84–85, 87. Because the Court of Appeals affirmed the District Court's disposition of those issues, 676 F. 2d 322, 326 (CA8 1982), and because respondent has not filed a cross-petition for certiorari, those matters are not before us.

[6] In its original opinion, the Court of Appeals seems to have proceeded on the assumption that Commissioner Norton had filed her charge on behalf of an individual aggrieved party. When informed that the charge

In the court's view, the material provided to respondent in this case failed to satisfy the foregoing standards. The EEOC's petition for rehearing en banc was denied. 689 F. 2d 757 (1982).[7]

We granted certiorari to resolve the confusion in the Courts of Appeals concerning the material that must be included in charges of employment discrimination and notices thereof before the EEOC may obtain judicial enforcement of an administrative subpoena.[8] 459 U. S. 1199 (1983). We now reverse.

II

A

Title VII of the Civil Rights Act of 1964, as amended,[9] prohibits various employment practices involving discrimination on the basis of "race, color, religion, sex, or national origin." 42 U. S. C. §§ 2000e–2, 2000e–3. Primary respon-

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derived from the EEOC's systemic program, the court granted rehearing and modified its opinion in some respects, but adhered to its view that the Commission must specify in some detail the unlawful activities of which the employer is accused and must provide the employer with some of the evidence on which the accusations are founded. See *id.*, at 325, n. 5. Respondent's correspondence with the EEOC makes apparent that its officers have understood from the outset that the charge was based upon statistical manifestations of discrimination derived from the annual reports filed by respondent with the Commission. See App. 92, 157.

[7] Chief Judge Lay dissented from the denial, arguing that the decision of the panel "is supported by neither logic nor precedent, and would severely undermine the Commission's ability to bring commissioner's charges of discriminatory patterns and practices as authorized under 42 U. S. C. § 2000e–5." 689 F. 2d, at 759.

[8] For a variety of recent approaches to this problem, see *EEOC* v. *A. E. Staley Mfg. Co.*, 711 F. 2d 780, 786–787 (CA7 1983), cert. pending, No. 83–401; *EEOC* v. *K-Mart Corp.*, 694 F. 2d 1055, 1063–1064, 1067–1068 (CA6 1982); *EEOC* v. *Bay Shipbuilding Corp.*, 668 F. 2d 304, 312–313 (CA7 1981); *EEOC* v. *Dean Witter Co.*, *supra*, at 1337–1338.

[9] Pub. L. 88–352, Title VII, 78 Stat. 253, as amended by Pub. L. 92–261, 86 Stat. 103, 42 U. S. C. § 2000e *et seq.*

sibility for enforcing Title VII has been entrusted to the EEOC. § 2000e–5(a).

In its current form, Title VII sets forth "an integrated, multistep enforcement procedure" that enables the Commission to detect and remedy instances of discrimination. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 359 (1977). The process begins with the filing of a charge with the EEOC alleging that a given employer[10] has engaged in an unlawful employment practice. A charge may be filed by an aggrieved individual or by a member of the Commission. § 2000e–5(b). A Commissioner may file a charge in either of two situations. First, when a victim of discrimination is reluctant to file a charge himself because of fear of retaliation, a Commissioner may file a charge on behalf of the victim. *Ibid.*; 29 CFR §§ 1601.7, 1601.11 (1983). Second, when a Commissioner has reason to think that an employer has engaged in a "pattern or practice" of discriminatory conduct, he may file a charge on his own initiative. § 2000e–6(e).

Prior to 1972, different statutory requirements governed charges filed by aggrieved individuals and charges filed by Commissioners. Aggrieved parties were required simply to state their allegations "in writing under oath." Pub. L. 88–352, § 706(a), 78 Stat. 259. By contrast, a Commissioner could file a charge only when he had "reasonable cause to believe a violation of [Title VII] ha[d] occurred," and was obliged to "se[t] forth the facts upon which [the charge was] based." *Ibid.*[11] In 1972, as part of a comprehensive set of

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[10] Although Title VII also covers employment agencies, labor organizations, joint labor-management committees, and government agencies, 42 U. S. C. §§ 2000e, 2000e–2, 2000e–3, we are concerned here only with the provisions applicable to private employers.

[11] A few courts interpreting § 706 prior to the 1972 amendments concluded that the obligation to "se[t] forth the facts upon which [the charge is] based" applied to aggrieved parties as well as Commissioners. See *Rogers* v. *EEOC*, 454 F. 2d 234, 239 (CA5 1971), cert. denied, 406 U. S. 957 (1972); *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F. 2d 32, 37–38 (CA4 1971). Though the outcome of this case in no way turns upon the

amendments to the provisions of Title VII dealing with the EEOC's enforcement powers, Congress eliminated the special requirements applicable to Commissioners' charges. In its present form, § 706(b) of the statute provides simply that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U. S. C. § 2000e–5(b).

As originally enacted, Title VII required the EEOC to provide a copy of a charge to the employer accused of discrimination, but did not prescribe any time period within which the copy was to be delivered. Pub. L. 88–352, § 706(a), 78 Stat. 259. In 1972, Congress altered that provision to require the Commission to "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the] employer . . . within ten days" of the filing of the charge. 42 U. S. C. § 2000e–5(b).

After a charge has been filed, the EEOC conducts an investigation of the allegations contained therein.[12] In connection with its inquiry, the Commission is entitled to inspect and copy "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." § 2000e–8(a). In obtaining such evidence, the Commission may exercise all of the powers conferred upon the National Labor Relations Board by 29 U. S. C. § 161, including the authority to issue administrative subpoenas and to request judicial enforcement of those subpoenas. § 2000e–9. If, after completing its investigation, the EEOC determines that there is "reasonable

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issue, we think that, fairly read, the provision required only Commissioners to plead such "facts." Cf. *Local No. 104, Sheet Metal Workers* v. *EEOC*, 439 F. 2d 237, 239 (CA9 1971) (adopting the latter construction).

[12] In a case arising in a State that has an enforcement system paralleling that of Title VII, the Commission may not initiate its own investigation until the appropriate state agency has been afforded an opportunity to investigate and resolve the matter. §§ 2000e–5(c), (d).

cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b).[13] If those methods prove ineffectual, the Commission is empowered to bring a civil action against the employer. § 2000e–5(f)(1).

At issue in this case is the relationship between three of the steps in the integrated procedure just described: the charge; the notice given to the employer of the allegations against him; and the judicial enforcement of an administrative subpoena of personnel records relevant to the allegations. It is apparent from the structure of the statute that two of those steps—the charge and the subpoena—are closely related. As indicated above, the EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction,[14] the EEOC is entitled to access only to evidence "relevant to the charge under investigation." § 2000e–8(a).

The legislative history makes clear that this limitation on the Commission's authority is not accidental. As Senators Clark and Case, the "bipartisan captains" responsible for Title VII during the Senate debate, explained in their Interpretative Memorandum:

> "It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission or of the Wage and Hour Administrator, who are author-

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[13] If the EEOC finds that no such "reasonable cause" exists, it must promptly so inform the employer against whom the charge was made and the person (if any) claiming to be aggrieved. After receiving such notification, the aggrieved party may file a private action against the employer. § 2000e–5(f)(1).

[14] See, *e. g.*, 15 U. S. C. §§ 43, 46(b) (Federal Trade Commission).

ized to conduct investigations, inspect records, and issue subpenas, whether or not there has been any complaint of wrongdoing." 110 Cong. Rec. 7214 (1964) (citations omitted).

When Congress in 1972 revamped Title VII, it retained the provision linking the Commission's investigatory power to outstanding charges, and nothing in the legislative history of the 1972 amendments suggests that Congress intended to expand the range of materials to which the Commission could demand access.

In construing the EEOC's authority to request judicial enforcement of its subpoenas, we must strive to give effect to Congress' purpose in establishing a linkage between the Commission's investigatory power and charges of discrimination. If the EEOC were able to insist that an employer obey a subpoena despite the failure of the complainant to file a valid charge, Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted. Accordingly, we hold that the existence of a charge that meets the requirements set forth in § 706(b), 42 U. S. C. § 2000e–5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC.[15]

The relationship between the requirement that an employer be notified promptly of allegations against it and the EEOC's subpoena power is less clear. The statutory provisions that define the Commission's investigative authority do not mention the notice requirement. See §§ 2000e–8, 2000e–9. And nothing in the legislative history of the sharpened notice provision that was added to § 706 in 1972 suggests that Congress intended or assumed that compliance therewith was a prerequisite to judicial enforcement of the

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[15] The same conclusion has been reached by all of the Courts of Appeals that have considered the matter. See *EEOC* v. *K–Mart Corp.*, 694 F. 2d, at 1061; *EEOC* v. *Dean Witter Co.*, 643 F. 2d, at 1337–1338; *EEOC* v. *Appalachian Power Co.*, 568 F. 2d 354, 355 (CA4 1978); *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F. 2d, at 35.

Commission's subpoenas. There is thus substantial reason to doubt whether an employer should be able to resist efforts by the Commission to enforce a subpoena on the ground that the EEOC had not adequately notified the employer of the "date, place and circumstances" of the employer's alleged unlawful employment practices or had not done so within 10 days of the filing of the charge.[16]

For two reasons, however, we decline to decide that troublesome question in this case. First, all of the parties have assumed that noncompliance with the notice requirement is a legitimate defense to a subpoena enforcement action.[17] Second, our conclusion that the Commission did comply with the notice provision in this case, see Part II–C, *infra*, renders it unnecessary to determine whether the judgment of the Court of Appeals could withstand scrutiny if the Commission had not done so. In short, solely for the purpose of our decision

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[16] One court has suggested that "each one of the deliberate steps in this statutory scheme—charge, notice, investigation, reasonable cause, conciliation—[is] intended by Congress to be a condition precedent to the next succeeding step and ultimately legal action." *EEOC* v. *Container Corp. of America*, 352 F. Supp. 262, 265 (MD Fla. 1972). However, in one context germane to the problem before us, the lower courts have taken a more forgiving view of the relation between the steps in the Title VII enforcement sequence; when the EEOC has failed to notify the accused employer within 10 days of the filing of the charge, the courts have uniformly held that, at least in the absence of proof of bad faith on the part of the Commission or prejudice to the employer, the result is not to bar a subsequent suit either by the aggrieved party, see, *e. g.*, *Smith* v. *American President Lines, Ltd.*, 571 F. 2d 102, 107, n. 8 (CA2 1978), or by the Commission, see *EEOC* v. *Burlington Northern, Inc.*, 644 F. 2d 717, 720–721 (CA8 1981); *EEOC* v. *Airguide Corp.*, 539 F. 2d 1038, 1042 (CA5 1976).

[17] Thus, at oral argument, the Solicitor General conceded that "the question of whether the circumstances requirement of the statute has been complied with in the notice [may] be raised in a subpoena enforcement proceeding." Tr. of Oral Arg. 46. The result of the parties' common assumption is that the issue has not been briefed. Especially in an area as complex as Title VII enforcement procedure, we are loathe to take an analytical path unmarked by the litigants.

today, we assume that compliance with the notice requirement embodied in § 706(b) is a jurisdictional prerequisite to judicial enforcement of a Commission subpoena.

B

The statute itself prescribes only minimal requirements pertaining to the form and content of charges of discrimination. Section 706(b) provides merely that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U. S. C. § 2000e–5(b). However, in accordance with the last-mentioned clause, the EEOC has promulgated a regulation that provides, in pertinent part, that "[e]ach charge should contain . . . [a] clear and concise statement of the facts, including the pertinent dates, constituting the alleged unlawful employment practices." 29 CFR § 1601.12(a)(3) (1983).[18] Until rescinded, this rule is binding on the Commission as well as complainants. See *United States* v. *Nixon*, 418 U. S. 683, 695–696 (1974); *Service* v. *Dulles*, 354 U. S. 363, 388 (1957).

There is no question that the charge in this case comported with the requirements embodied in the statute; Commissioner Norton's allegations were made in writing and under oath. The only ground on which the validity of the charge can fairly be challenged is Commissioner Norton's compliance with the Commission's regulation. The Court of Appeals concluded that the charge did not contain enough information to satisfy § 1601.12(a)(3). 676 F. 2d, at 325. To assess that conclusion, we must explicate the crucial portion of the regulation as applied to a charge alleging a pattern or practice of discrimination.[19]

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[18] An identical regulation was in force at the time the charge in this case was filed. See 29 CFR § 1601.12(a)(3) (1979).

[19] Section 707(e) of the statute, 42 U. S. C. § 2000e–6(e), which authorizes the EEOC "to investigate and act on a charge of a pattern or practice of discrimination," provides that "[a]ll such actions shall be conducted in ac-

Three considerations, drawn from the structure of Title VII, guide our analysis. First, a charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is "reasonable cause" to believe that the employer has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding.

Second, a charge does have a function in the enforcement procedure prescribed by Title VII. As explained above, the Commission is entitled to access only to evidence "relevant" to the charge under investigation. § 2000e–8. That limitation on the Commission's investigative authority is not especially constraining. Since the enactment of Title VII, courts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that

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cordance with the procedures set forth in [§ 706, 42 U. S. C. §]2000e–5." As indicated in the text, § 706 expressly delegates to the EEOC responsibility to determine the form and content of charges of discrimination. The statutory scheme thus empowers the Commission to promulgate regulations that differentiate between charges alleging individual instances of discrimination and charges alleging patterns or practices of discrimination. The Commission has not exercised that authority. Instead, it has adopted a single regulation, 29 CFR § 1601.12 (1983), applicable to both kinds of charges. The result is considerable awkwardness when complainants try to fit allegations of systemic discrimination into a mold designed primarily for individual claims. Under these circumstances, we can and must try to construe § 1601.12, as applied to systemic charges, in a manner consistent both with the plain language of the rule and with the structure and purposes of Title VII as a whole. But our task would be made significantly easier if the Commission saw fit to adopt special regulations more closely tailored to the characteristics of "pattern-or-practice" cases.

might cast light on the allegations against the employer.[20] In 1972, Congress undoubtedly was aware of the manner in which the courts were construing the concept of "relevance" and implicitly endorsed it by leaving intact the statutory definition of the Commission's investigative authority.[21] On the other hand, Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.

Third, it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired. By 1972, Congress was aware that employment discrimination was a "complex and pervasive" problem that could be extirpated only with thoroughgoing remedies; "[u]nrelenting broad-scale action against patterns or practices of discrimination" was essential if the purposes of Title VII were to be achieved.[22] The EEOC, because "[i]t has access to the most current statistical computations and analyses regarding employment patterns" was thought to be in the best position "to determine where 'pattern or practice' litigation is warranted" and to pursue it.[23] Accordingly, in its amendments to § 707,

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[20] See, *e. g.*, *Blue Bell Boots, Inc.* v. *EEOC*, 418 F. 2d 355, 358 (CA6 1969); cf. *Local No. 104, Sheet Metal Workers* v. *EEOC*, 439 F. 2d, at 243 (information regarding pre-1965 practices is relevant to an EEOC inquiry).

Cf. *United States* v. *Arthur Young & Co.*, 465 U. S. 805, 814–815 (1984) (adopting a comparably expansive definition of "relevance" in the analogous context of an IRS subpoena, pursuant to 26 U. S. C. § 7602, of workpapers pertaining to an investigation of the correctness of a tax return).

[21] See *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S. 590, 599–600 (1981); Section-by-Section Analysis of H. R. 1746, 118 Cong. Rec. 7166 (1972) ("In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII").

[22] H. R. Rep. No. 92–238, pp. 8, 14 (1971); see also S. Rep. No. 92–415, p. 5 (1971).

[23] H. R. Rep. No. 92–238, *supra*, at 14.

Congress made clear that Commissioners could file and the Commission could investigate such charges.[24] Our interpretation of the EEOC's regulations should not undercut the exercise of those powers.

With these three considerations in mind, we must assess the proffered interpretations of the requirement embodied in § 1601.12(a)(3) that a Commissioner, when filing a "pattern-or-practice" charge, must state "the facts . . . constituting the alleged unlawful employment practices." One reading of the crucial phrase would impose on the Commissioner a duty to specify the persons discriminated against, the manner in which they were injured, and the dates on which the injuries occurred. But such a construction of the regulation would radically limit the ability of the EEOC to investigate allegations of patterns and practices of discrimination. The Commission has developed a complex set of procedures for identifying employers who may be engaging in serious systemic discrimination. See EEOC Compliance Manual § 16 (1981). The Commission staff reviews the annual reports filed by employers with the EEOC and with the Office of Federal Contract Compliance Programs of the Department of Labor and combines those data with information garnered from other sources regarding employers' practices. *Id.*, §§ 16.3(a), (c). If the resulting composite picture of an employer's practices matches one of a set of prescribed standards,[25] the staff

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[24] There are indications in the legislative history, see 110 Cong. Rec. 14189 (1964) (remarks of Sen. Pastore), and in the case law, see, *e. g.*, *Local No. 104, Sheet Metal Workers* v. *EEOC*, *supra*, at 240–241, that these powers existed even before 1972. In any event, the amendment to § 707 removed any doubt as to the authority of the EEOC to investigate "pattern-or-practice" charges brought by Commissioners.

[25] The standards themselves are set forth in § 16.2 of the Compliance Manual. Most pertain to disparities between the numbers of women and minorities employed in given positions by a given employer and the numbers available in the pertinent labor pool or the number employed by comparable, nearby employers. The premise of these standards is that nondiscriminatory employment practices will, over time, result in a work

presents a report to a Commissioner, recommending that a charge be filed. *Id.*, §§ 16.3(d), (e). If the Commissioner agrees with the recommendation, he files a sworn charge of systemic discrimination. At that stage of the inquiry, the Commissioner filing the charge has substantial reason, based upon statistical manifestations of the net effects of the employer's practices, to believe that the employer has violated Title VII on a continuing basis. But the Commissioner rarely can identify any single instance of discrimination until the Commission has gained access to the employer's personnel records. Thus, a requirement that the Commissioner in his charge identify the persons injured, when and how, would cut short most of these investigations. That result would be manifestly inconsistent with Congress' intent.

The Court of Appeals adopted a somewhat more moderate construction of the regulation. In that court's view, § 1601.12(a)(3) requires a Commissioner to disclose some portion of the statistical data on which his allegations of systemic discrimination are founded. 676 F. 2d, at 325–326. This interpretation has little to recommend it. The data that undergird the Commissioner's suspicions surely do not "constitute" the alleged unlawful employment practices; the Court of Appeals' proposal is thus unsupported by the plain language of the regulation. More importantly, the court's interpretation is sustained by none of the three pertinent legislative purposes. First, the Court of Appeals' construction would, in effect, oblige the Commissioner to substantiate his allegations *before* the EEOC initiates an investigation, the purpose of which is to determine whether there is reason to believe those allegations are true. Such an obligation is plainly inconsistent with the structure of the enforcement procedure. Second, disclosure of the data on which the

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force whose composition approximates that of the available labor force, while discriminatory practices will result in a work force in which minorities and women are underrepresented. See *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977).

Commissioner's allegations are based would in no way limit the range of materials to which the EEOC could demand access, because, under the statute, the Commission may insist that the employer disgorge any evidence relevant to the allegations of discrimination contained in the charge, regardless of the strength of the evidentiary foundation for those allegations.[26] Third, the imposition on the EEOC of a duty to reveal the information that precipitated the charge would enable a recalcitrant employer, in a subpoena enforcement action, to challenge the adequacy of the Commission's disclosures and to appeal an adverse ruling by the district court on that issue. The net effect would be to hamper significantly the Commission's ability to investigate expeditiously claims of systemic discrimination.

Rejection of the two proposals just discussed does not imply that a Commissioner should be permitted merely to allege that an employer has violated Title VII. Such a result would be inconsistent with the evident purpose of the regulation—to encourage complainants to identify with as much precision as they can muster the conduct complained of. And it would render nugatory the statutory limitation of the Commission's investigative authority to materials "relevant" to a charge. With these concerns in mind, we think that the

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[26] Some of respondent's arguments are based on the assumption that a district court, when deciding whether to enforce a subpoena issued by the EEOC, may and should determine whether the charge of discrimination is "well founded" or "verifiable." See Brief for Respondent 6, 22, 27–28, 30. Nothing in the statute or its legislative history provides any support for this assumption. The district court has a responsibility to satisfy itself that the charge is valid and that the material requested is "relevant" to the charge, see *supra*, at 65, 68–69, and n. 20, and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose. See *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964); *United States* v. *Morton Salt Co.*, 358 U. S. 632, 652–653 (1950). However, any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error.

most sensible way of reading the prescription embodied in 29 CFR § 1601.12(a)(3) (1983) in the context of pattern-and-practice cases is as follows: Insofar as he is able, the Commissioner should identify the groups of persons that he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced.

The charge issued by Commissioner Norton, as amended, plainly satisfied the foregoing standards. The charge identified Negroes and women as the victims of respondent's putative discriminatory practices. It specified six occupational categories to which Negroes had been denied equal access and seven categories to which women had been denied equal access.[27] It alleged that respondent had engaged in discrimination in "recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment." And it charged respondent with engaging in these illegal practices since at least the effective date of the Civil Rights Act. We therefore conclude that the charge complied with the requirement embodied in § 1601.12(a)(3)

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[27] See n. 1, *supra*. Commissioner Norton prefaced her identification of these categories with an averment that "[m]ore specifically, [respondent's] unlawful discriminatory practices include, but are not limited to: . . . ." App. to Pet. for Cert. 44a. We do not believe that these introductory phrases rendered meaningless the lists of occupational categories that followed. Rather, we think that the quoted language constituted simply an acknowledgment that the EEOC had statutory authority to inquire into respondent's employment practices pertaining to occupational categories outside of those in which the Commission already had reason to think respondent had been engaging in discrimination, see n. 20, *supra*. By ensuring that respondent was aware of the Commission's expansive investigatory authority, Commissioner Norton made it less likely that respondent would deliberately or inadvertently destroy records relevant to the EEOC's impending investigation, in violation of the Commission's regulations, see n. 35, *infra*.

that a complainant must state "the facts . . . constituting the alleged unlawful employment practices."[28]

C

To make sense of the notice requirement, embodied in § 706(b), in the context of a charge filed by a Commissioner alleging a pattern or practice of discrimination, we must supplement the considerations discussed thus far with some additional principles and policies. Most importantly, we must strive to effectuate Congress' purpose in incorporating into the statute the current notice provision. Though the legislative history is sparse, the principal objective of the provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC. Prior to 1972, the EEOC had become prone to postponing until it was ready to begin an investigation the mandatory no-

[28] The EEOC contends that, even if the Court of Appeals had been correct in concluding that the charge failed to comply with § 1601.12(a)(3), the court's conclusion that the charge was invalid would have been erroneous because the charge surely satisfies § 1601.12(b), which provides that, "[n]otwithstanding the provisions of paragraph (a) . . . , a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." In other words, the EEOC contends that, to the extent the injunction embodied in subsection (a)(3) of the regulation gives rise to pleading requirements exceeding those set forth in subsection (b), subsection (a)(3) is merely precatory. The EEOC's interpretation of its own rules is entitled to deference. However, respondent argues with considerable force that the language and context of subsection (b) make clear that it was designed to enable the Commission to proceed with an investigation when an aggrieved layman, unfamiliar with the Commission's regulations, filed a charge that was deficient in some respect, not to excuse a Commissioner from the requirements of subsection (a)(3). In view of our conclusion that Commissioner Norton's charge satisfied § 1601.12(a)(3), we need not resolve this issue. We merely note that this is another instance in which regulations more carefully tailored to the varying characteristics of different kinds of charges would facilitate the task of courts trying to give effect to the Commission's rules. See n. 19, *supra*.

tification to the employer that charges were pending against it.[29] In response to complaints regarding the unfairness of this practice, Congress adopted the present requirement that notice be given to an accused employer within 10 days of the filing of the charge.[30] The requirement that the notice contain an indication of the "date, place and circumstances of the alleged unlawful employment practice" seems to have been designed to ensure that the employer was given some idea of the nature of the charge; the requirement was not envisioned as a substantive constraint on the Commission's investigative authority.[31]

Respondent suggests that, despite the absence of supportive legislative history, we should infer from the structure of the statute, as amended, an intent on the part of Congress to use the notice requirement to limit the EEOC's ability to investigate charges of discrimination. The purpose of the obligation to inform an employer of the "circumstances" of its alleged misconduct, respondent contends, is to force the EEOC "to state the factual basis for its charge," and thereby

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[29] See *Chromcraft Corp.* v. *EEOC*, 465 F. 2d 745, 747–748 (CA5 1972); B. Schlei & P. Grossman, Employment Discrimination Law 942–943 (2d ed. 1983).

[30] Thus, the section-by-section analysis of S. 2515, from which the notice requirement was derived, explained the provision as follows: "In order to accord respondents fair notice that charges are pending against them, this subsection provides that the Commission must serve a notice of the charge on the respondent within ten days . . . ." 118 Cong. Rec. 4941 (1972).

[31] Thus, for example, the Senate Report described and justified the portion of S. 2515 that ultimately became the notice provision as follows:

"Recognizing the importance that the concept of due process plays in the American ideal of justice, the committee wishes to emphasize certain provisions which are included in the bill to insure that fairness and due process are part of the enforcement scheme.

. . . . . .

"1. . . . The Commission must serve the respondent with a notice of the charge, *which would advise the respondent of the nature of the alleged violation.* As amended by the committee, the bill would require such notice to be served on the respondent within 10 days." S. Rep. No. 92–415, p. 25 (1971) (emphasis added).

to provide a reviewing court with an "objective verifiable method for determining whether [the Commission] ha[s] authority to investigate." Brief for Respondent 30. Respondent's proposed reconstruction of the reasoning that might have prompted Congress to adopt the notice provision is inconsistent with the pattern and purposes of the 1972 amendments to Title VII. At the same time it strengthened the notice provision, Congress eliminated the requirement that, before filing a charge, a Commissioner must have "reasonable cause" to believe a violation of Title VII had been committed. The only plausible explanation for that change is that Congress wished to place a Commissioner on the same footing as an aggrieved private party: neither was held to any prescribed level of objectively verifiable suspicion at the outset of the enforcement procedure.[32] Rather, the determi-

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[32] The bill initially passed by the House retained the "reasonable cause" requirement for Commissioners' charges and the requirement that charges filed by aggrieved parties be "in writing under oath." H. R. 1746, 92d Cong., 1st Sess., § 3(a) (1971). The version passed by the Senate abandoned the "reasonable cause" requirement for Commissioners' charges and provided that all charges shall be under "oath or affirmation." S. 2515, 92d Cong., 1st Sess., § 4(a) (1971). The Conference Committee that reconciled the bills adopted the position taken by the Senate on these two points. S. Conf. Rep. No. 92–681, p. 16 (1972). The legislative history does not disclose what motivated the Conference Committee to make the choices it did. Respondent suggests, nevertheless, that we infer from the Committee's adoption of a general requirement that charges be "under oath or affirmation" (in conjunction with the addition of the sharpened notice requirement) an intent on the part of the Committee to retain—indeed to reinforce—"the 'reasonable cause to believe' standard" applicable to Commissioners' charges. Brief for Respondent 17.

We find respondent's suggestion highly implausible. It is apparent that the oath requirement on its own cannot bind a Commissioner to an objectively verifiable level of suspicion when filing a charge. The function of an oath is to impress upon its taker an awareness of his duty to tell the truth, not to oblige him to plead facts having a prescribed evidentiary value. See E. Cleary, McCormick on Evidence 582 (2d ed. 1972). In the absence of any evidence that Congress understood there to be a link between the re-

nation whether there was any basis to their allegations of discrimination was to be postponed until after the Commission had completed its inquiries. It is highly unlikely that, having deliberately freed Commissioners from the duty to substantiate their suspicions before initiating investigations, Congress *sub silentio* reinstated that duty by requiring that employers be notified of the "circumstances" of their unlawful employment practices.[33] Accordingly, we conclude that the specific purpose of the notice provision is to give employers fair notice of the existence and nature of the charges against them.

Finally, in explicating the notice requirement, we must keep in view the more general objectives of Title VII as a whole. The dominant purpose of the Title, of course, is to root out discrimination in employment. But two other policies, latent in the statute, bear upon the problem before us. First, when it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the Act. That hope proved overly optimistic, and the recalcitrance of many employers compelled Congress in 1972 to strengthen the EEOC's investigatory and enforcement powers.[34] How-

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quirement that the *charge* must be "under oath or affirmation" and the new requirement that the *notice* indicate the "date, place and circumstances of the alleged unlawful employment practice," we decline to posit such an unlikely connection. In sum, we conclude that, by abandoning the "reasonable cause" standard, Congress meant to loosen, not tighten, the constraints on the authority of Commissioners to file charges.

[33] Note that the effect of respondent's reading of the notice provision would be to hold private complainants as well as Commissioners to an objectively verifiable level of "reasonable" suspicion before they could empower the EEOC to proceed with an investigation. It is undisputed that victims of discrimination were not under such a duty prior to 1972. In the absence of any supportive evidence in the legislative history, it is hard to believe that Congress meant to create such an important new restriction on the EEOC's enforcement power.

[34] See H. R. Rep. No. 92–238, pp. 3–4, 8–9 (1971); S. Rep. No. 92–415, pp. 4–5, 17 (1971).

ever, Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation. See *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 228 (1982). Second, the statute contemplates that employers will create and retain personnel records pertinent to their treatment of women and members of minority groups.[35] Both to assist the EEOC in policing compliance with the Act and to enable employers to demonstrate that they have adhered to its dictates, it is important that employers be given sufficient notice to ensure that documents pertaining to allegations of discrimination are not destroyed. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S., at 372.

With these considerations in mind, we turn to an assessment of the competing interpretations of the notice provision. It would be possible to read the requirement that the employer be told of "the date, place and circumstances of the alleged unlawful employment practice" as compelling a specification of the persons discriminated against, the dates the alleged discrimination occurred, and the manner in which it was practiced. We reject that construction for the same reason we rejected an analogous reading of 29 CFR § 1601.12 (a)(3) (1983) pertaining to the contents of charges: it would drastically limit the ability of the Commission to investigate allegations of systemic discrimination, and therefore would be plainly inconsistent with Congress' intent. See *supra*, at 70–71.

A more moderate construction of § 706(b) would require the Commission to include in the notice given to the employer

[35] Pursuant to the authority conferred upon it by 42 U. S. C. § 2000e–8(c), the EEOC has promulgated 29 CFR § 1602.14 (1983), which requires an employer covered by Title VII to retain all personnel records for six months after they are created and, when a charge of discrimination has been filed against the employer, to retain all records relevant to the charge until the dispute is resolved.

the same information that 29 CFR § 1601.12(a)(3) (1983) (as we have now construed it) presently requires to be included in a charge alleging a pattern or practice of discrimination. See *supra*, at 72–73. That interpretation of the statutory requirement would seem to satisfy all of the pertinent legislative purposes. First, it would provide the employer with fair notice of the allegations against it. Second, by informing the employer of the areas and time periods in which the Commissioner suspects that the employer has discriminated, the notice so construed would enable the employer, if it is so inclined, to undertake its own inquiry into its employment practices and to comply voluntarily with the substantive provisions of Title VII. Finally, notice of this sort would alert the employer to the range of personnel records that might be relevant to the Commission's impending investigation and thus would ensure that those records were not inadvertently destroyed.[36]

Respondent asks us to read the statute to require the EEOC to supplement notification of the kind just described with a summary of the statistical data on which the Commissioner's allegations are founded. We decline the invitation. The data relied upon by the Commissioner are not easily encompassed by the phrase, "date, place and circumstances of the alleged unlawful employment practice"; thus, the plain language of § 706(b) provides little support for respondent's proposed construction. More importantly, respondent's in-

[36] This construction of the notice provision gains further credence from its consistency with procedures adopted by the EEOC. The pertinent regulation prescribes that, in the usual case, compliance with the notice requirement is to be achieved by providing the accused employer with "a copy of the charge" within 10 days of its filing. 29 CFR § 1601.14 (1983). Though the regulation contains an exception for cases in which "providing a copy of the charge would impede the law enforcement functions of the Commission," *ibid.*, it does not suggest that the employer is ever entitled to more information than that contained in the charge itself. The Commission's practice, which reflects its interpretation of its statutory obligations, is entitled to deference. See *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 761 (1979); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971).

terpretation of the provision would not advance significantly any of the provision's purposes. Disclosure of the statistics relied on by the complainant clearly is not necessary to give the employer fair notice of the allegations against it. Nor would such disclosure aid the employer in identifying and preserving those employment records that might be relevant to the forthcoming EEOC investigation. Finally, revelation of the data on which the Commissioner relied would do little to aid an employer who wished to comply voluntarily with the Act. A good-faith effort to remedy past misconduct and to prevent future violations would require the employer to investigate its prior and current practices in all of the areas identified in the charge; revelation of the evidence that precipitated the charge would not relieve the employer of the duty to conduct such an inquiry. Moreover, most of the data on which a "pattern-or-practice" charge is based are provided by the employer itself in the form of annual reports filed with the EEOC, see 29 CFR §§ 1602.7, 1602.11 (1983); the employer thus cannot plead ignorance of the figures relied upon by the Commissioner. Nor would disclosure of the manner in which the Commission staff analyzed those figures materially assist the employer in complying with the statute, because the purpose of the staff's analysis is not to determine whether and how the employer has committed unlawful employment practices, but rather "to identify situations where the patterns of employment discrimination are the most serious, and where the maintenance of a successful 'systemic case' will have a significant positive impact on the employment opportunities available to minorities and women." EEOC Compliance Manual § 16.1 (1981).[37]

[37] To put this last point differently, the objective of the Commission's statistical analyses at this preliminary stage is not to pinpoint aspects of employers' practices that depart from the dictates of Title VII, but simply to locate cases that may entail serious and large-scale violations of the statute. Affording an accused employer access to those analyses would thus do little to assist the employer in bringing itself into full compliance with the law.

Any marginal advantage, in terms of facilitating voluntary compliance by well-intentioned employers, entailed by respondent's proposal would be more than offset by the concomitant impairment of the ability of the EEOC to identify and eliminate systemic employment discrimination. To construe the notice requirement as respondent suggests would place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC. It would always be open to such an employer to challenge the adequacy of the Commission's disclosure of the data on which a charge is founded. If the employer then refused to comply with the Commission's subpoena, a district court would be required to assess the employer's contention before the subpoena could be enforced. The difficulties of making such an assessment responsibly and the opportunities for appeals of district court judgments would substantially slow the process by which the EEOC obtains judicial authorization to proceed with its inquiries.[38]

Accordingly, we construe § 706(b) to require the Commission, within 10 days of the filing of a charge, to reveal to the employer all of the information that must be included in the charge itself under the current version of 29 CFR § 1601.12(a)(3) (1983). Because respondent was provided with a copy of Commissioner Norton's charge 10 days after it was filed with the EEOC, and because the charge itself comported with § 1601.12(a)(3), see *supra*, at 73, we conclude that the notice provision was satisfied in this case.

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[38] Cf. *FTC* v. *Standard Oil Co. of California*, 449 U. S. 232, 241–243 (1980) (judicial review of early phases of an administrative inquiry results in "interference with the proper functioning of the agency" and "delay[s] resolution of the ultimate question whether the Act was violated").

Note that, in this case, the EEOC's efforts to gain access to respondent's records have been stymied for over three years. We do not mean to imply that respondent falls into the category of recalcitrant employers, but the litigation tactics successfully employed by respondent easily could be put to improper ends.

III

For the foregoing reasons, we find that all of the strictures embodied in Title VII and in the regulations promulgated thereunder, pertaining to the form and content of a charge of systemic discrimination and to the timing and adequacy of the notice afforded the accused employer, were adhered to in this case. Consequently, the Commission was entitled to enforcement of its subpoena. The Court of Appeals' judgment to the contrary is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I agree with much of what the Court has written. But the Court has deliberately declined to come to grips with the crucial threshold issue in this case: Is inadequate notice a legitimate defense to a subpoena enforcement action brought by the Equal Employment Opportunity Commission (EEOC or Commission)? If it is not, the Court's concern that a meaningful notice requirement would impede the EEOC's investigations is wholly unfounded. The Court clearly suggests it is inclined to answer the question in the negative, see *ante*, at 65–66, 75–77, but then proceeds on the assumption that the question has not been properly presented or briefed. I believe the question is before us and should be addressed.

While respondent Shell Oil Co. (Shell) has maintained throughout that a subpoena may not be enforced if the notice filed in connection with the investigation was unlawful, the EEOC has not conceded the point. In connection with the statement cited by the Court *ante*, at 66, n. 17, the EEOC conceded that questions concerning the adequacy of the notice may be raised at the enforcement proceeding. But I find no clear concession here or in the EEOC's briefs that if

notice is inadequate a district court should then quash the EEOC's subpoena. To the contrary, the entire thrust of the EEOC's position is that investigation should not be postponed for the purpose of weighing the adequacy of the notice. That the EEOC has adamantly maintained that the notice furnished to Shell was in fact lawful need not be read as a concession that, if it had not been, the subpoena would properly have been quashed. The EEOC's view of the link between the adequacy of notice and the enforceability of the subpoena is unquestionably less than crystalline. But in such circumstances the Court is not bound to adopt a reading of the statute that is without sound support in the statutory text.

I agree with the Court that a proper *charge* is a prerequisite to enforcement of an EEOC subpoena. The EEOC has broad flexibility in determining precisely what must be included in the charge. And the charge against respondent Shell was consistent with requirements laid out in the statute and regulations. I therefore agree with the Court's conclusion that the Court of Appeals erred in directing the District Court not to enforce the EEOC's subpoena.

But in my view the Court of Appeals correctly concluded that the notice furnished to Shell was inadequate. The statute makes quite clear that the notice of charge must be more informative than the charge itself. Accordingly, I believe the District Court should enforce the EEOC's subpoena but simultaneously direct the EEOC to furnish Shell with adequate notice of the "date, place and circumstances" of the allegedly unlawful employment practices underlying the charge.

I

Systemic "pattern or practice" discrimination by an employer triggers four separate but coordinated steps by the EEOC. The requirements and purposes of one of these steps—furnishing the employer with notice of a charge—can be understood only in the context of the other three.

(1) Filing a charge with the Commission. A charge is a complaint filed with the EEOC "alleging that an employer . . . has engaged in an unlawful employment practice . . . ." 42 U. S. C. § 2000e–5(b). A charge may be filed by "a person claiming to be aggrieved." *Ibid.* Alternatively, a "Commissioner's charge" may be filed when a Commissioner decides to initiate a complaint, usually on the basis of a "pattern or practice" of discrimination. 42 U. S. C. § 2000e–6(e). A Commissioner identifies such instances of "systemic" discrimination by comparing statistics furnished to the Commission by the employer with employment statistics for the market from which the Commissioner believes the employer should be hiring. In either event, a charge is filed with the Commission, not with or against the allegedly discriminating employer. Charges must generally be filed within 180 days after the alleged unlawful employment practice occurred. 42 U. S. C. § 2000e–5(e). The form of a charge is flexible: the statute requires only that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U. S. C. § 2000e–5(b). In the case of a Commissioner's charge the oath or affirmation is made by the EEOC Commissioner who formally reviews the evidence suggesting a pattern or practice of discrimination.

Commission regulations provide that all charges should contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices . . . ." 29 CFR § 1601.12(a)(3) (1983). But the regulations go on to state:

> "Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to

clarify and amplify allegations made therein." 29 CFR § 1601.12(b) (1983).

Thus under both the statute and the regulations a charge may be accepted by the Commission even if it lacks a full description of the "date, place and circumstances" of the alleged unlawful employment practices.

Internal EEOC guidelines set out more specific conditions applicable only to a Commissioner's pattern or practice charges. According to § 16 of the EEOC Compliance Manual (1982), reprinted in App. to Pet. for Cert. 40a–43a, the EEOC looks for employers who meet one of six statistical profiles:

(1) employers "who continue in effect policies and practices which result in low utilization of available minorities and/or women";

(2) employers "who employ a substantially smaller proportion of minorities and/or women than other employers in the same labor market who employ persons with the same general level of skills";

(3) employers who employ "a substantially smaller proportion of minorities and/or women" in their higher paid than their lower paid job categories;

(4) employers who maintain recruitment hiring, assignment, promotion, discharge or other policies not justified by business necessity "that have an adverse impact on minorities and/or women";

(5) employers who utilize restrictive employment practices that "are likely to be used as models for other employers"; or

(6) employers who fail to provide available minorities and women with fair access to employment if the employer has "substantial numbers of employment opportunities."

Members of the EEOC staff compile statistics or other factual materials to identify such patterns. The figures are passed through successive stages of staff review within the Commission and finally presented to an EEOC Commissioner, in the form of a "memorandum detailing information

concerning respondent's practices, the reasons for selecting the respondent (including a showing that at least one of the systemic selection standards applies to the respondent), and a description and justification of the proposed scope of the case."[1] Each recommendation is accompanied by a Commissioner charge ready for signature.

(2) Notice of the charge. Once a charge has been filed with the EEOC, "the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the respondent] . . . within ten days . . . ."[2] 42 U. S. C. §2000e–5(b). The notice of charge is not the same, nor was it intended to serve the same purpose, as the charge itself. Before 1972 notice was provided by serving a copy of the charge on the employer, 42 U. S. C. §2000e–5(a) (1970 ed.), and in 1972 the House bill would have preserved that form of notice.[3] But the Senate's different view prevailed. As amended in 1972, 42 U. S. C. §2000e–5(b) expressly requires more in the notice of charge than in the charge itself. A charge need only allege an unlawful employment practice and "contain such information and be in such form as the Commission requires." *Ibid.* Its purpose is prospective—to initiate the investigation, to set out the bounds of the unlawful employment practices that the Commission suspects it may ultimately discover. A notice of charge, in contrast, must "includ[e] the date, place and circumstances of the alleged unlawful employment practice." *Ibid.* Its basic purpose is retrospective—to identify what the agency has in hand when it initiates the

[1] EEOC Compliance Manual §16 (1982), reprinted in App. to Pet. for Cert. 43a.

[2] See also 42 U. S. C. §2000e–5(e). Similarly, "[i]n the case of any charge filed by a member of the Commission . . . the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials . . . ." 42 U. S. C. §2000e–5(d).

[3] See H. R. Conf. Rep. No. 92–899, p. 16 (1972). Before 1972, however, a charge also recited the "facts" of the allegedly discriminatory conduct. 42 U. S. C. §2000e–5(a) (1970 ed.).

investigation. Thus, absent Commission regulations to the contrary, a charge might satisfy the statutory requirements even if it contained only a naked allegation of a violation of Title VII. The notice of charge would nevertheless have to say more, disclosing the date, place and circumstances of the conduct that triggered the complainant's suspicions in the first place. Commission regulations provide the EEOC with precisely the tools it requires to gather any additional information from the complainant that may be needed to furnish adequate notice to the employer. 29 CFR § 1601.15(b) (1983).

(3) Investigation of a charge. The EEOC has the duty to investigate all charges, 42 U. S. C. §§ 2000e–5(b), 2000e–6(e), and to that end it is vested with broad investigatory power:

> "In connection with any investigation of a charge filed under section 2000e–5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . . and is relevant to the charge under investigation." 42 U. S. C. § 2000e–8(a).

Equally important, the EEOC may investigate a pattern or practice charge without making any preliminary finding that there is "reasonable cause" to believe the charge is true. A threshold "reasonable cause" requirement existed before the 1972 amendments,[4] and would have been retained by the

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[4] The original version of this subsection provided in pertinent part:

"Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer . . . has engaged in an unlawful employment practice, the Commission shall furnish such employer . . . with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission." 42 U. S. C. § 2000e–5(a) (1970 ed.).

Senate's bill in 1972. But the House's more liberal position prevailed and is reflected in § 2000e–5(b) as finally enacted.

(4) Disposition of the charge. A "reasonable cause" requirement does however remain applicable at the conclusion of the EEOC's investigation. At that stage the Commission must either dismiss the charge or press for a remedy.

Dismissal is required if "there is not reasonable cause to believe that the charge is true." 42 U. S. C. § 2000e–5(b). Again, prompt notice to the respondent is required. *Ibid.*

If, on the other hand, the charge appears to be valid, the Commission must first attempt an informal resolution of the problem. "If the Commission determines after . . . investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.*[5] Only if informal attempts to resolve the problem fail is a civil action by the Commission or the Attorney General in order:

> "If within thirty days after a charge is filed with the Commission or within thirty days after expiration of [time limits as affected by state or local enforcement proceedings] the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . ." 42 U. S. C. § 2000e–5(f)(1).[6]

II

It is against this statutory background that we must assess the notice the EEOC furnishes to an employer in connection

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[5] Similarly, the EEOC must grant a State in which the alleged discrimination has occurred "a reasonable time, but not less than sixty days . . . to act under such State or local law to remedy the practice alleged." 42 U. S. C. § 2000e–5(d).

[6] Civil actions alleging pattern or practice discrimination are brought by the Attorney General. The complaint must "se[t] forth facts pertaining to such pattern or practice . . . ." 42 U. S. C. § 2000e–6(a).

with a pattern or practice discrimination charge. On its face, the notice of charge served on Shell contains no information whatsoever concerning the "date, place and circumstances" of the alleged discrimination. App. 62–63. Instead, it refers to a copy of the charge itself, attached to the notice. The charge, for its part, identifies the "place" as Shell's Wood River Refinery, but supplies no "date" for the alleged violations, and includes only the most sweepingly broad and unspecific discussion of the "circumstances" of the alleged discrimination. Without elaboration, the charge alleges Shell's failure "to recruit, hire, promote, train, assign or select Blacks" in six broadly defined job categories, and its failure "to recruit, hire, promote, train, select, and assign females" to seven job categories. App. to Pet. for Cert. 44a. For good measure the charge states that the discriminatory practices "include, but are not limited to" those specified. *Ibid.* Over a year after the notice of the charge was filed, the charge itself was amended to include a "date" for the alleged violations: "from July 2, 1965, continuing through at least the date of the charge." *Id.*, at 47a. It has not escaped notice that July 2, 1965, was the day on which the Civil Rights Act of 1964 became effective.

In my view this brief, formal, and wholly uninformative "charge," appended to an entirely empty "notice," did not comport with the language and purposes of § 2000e–5(b)'s notice requirement. A two-paragraph piece of vacuous legal boilerplate that completely omits the statistical information that the EEOC has in fact relied on in filing the charge serves none of the purposes that underlie the notice requirement.

As a threshold matter, I agree with the Court, *ante*, at 75–77, that the notice provision is not intended to circumscribe the EEOC's investigative authority. The charge, not the notice of the charge, sets the contours of the investigation. But notice to those who are selected as the targets of a Government employment discrimination investigation has been judged by Congress to be desirable in and of itself.

I agree with the Court that a first purpose of the notice provision is "to provide employers fair notice that accusations of discrimination have been leveled against them." *Ante*, at 74. As explained in the Senate Report accompanying the 1972 amendments to Title VII, the notice requirement was "included in the bill to insure that fairness and due process are part of the enforcement scheme," and for the "[p]rotection of [the] rights of [the] respondent."[7] Experience teaches that Government administrative agency investigations can be prone to abuse; they are likely to be conducted more reasonably, more carefully, and more fairly, when the concerned parties are adequately notified of the causes of the investigation that are in progress.

Second, effective notice may conserve both employer and agency resources by moderating the confrontational posture of the investigation and allowing the employer to explain or clarify its position to the EEOC. In addition, as the Court points out *ante*, at 79, notice helps to ensure that documents pertaining to the investigation are preserved.

Finally, and perhaps most importantly, the notice requirement serves a purpose that is central to the statutory scheme—encouraging quick, voluntary, and informal resolution of complaints. I agree with the Court that the notice requirement must be construed so as to advance Congress' desire that the EEOC "attempt to resolve disputes through conciliation." *Ante*, at 78. The Act's overriding goal is not to promote the employment of lawyers but to correct discriminatory practices quickly and effectively. To this end, the EEOC is always required to attempt to resolve charges first through "informal methods of conference, conciliation, and persuasion." 42 U. S. C. § 2000e–5(b). The strict statutory time limits on filing a charge with the Commission, furnishing notice to the respondent of the "date, place and circumstances" of the activities underlying the charge, and

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[7] S. Rep. No. 92–415, p. 25 (1971).

investigating the charge, appear in the same subsection of the statute and are plainly intended to further the same objective. Adequate notice is especially important with respect to pattern or practice discrimination charges which need not involve intentional or knowing misconduct. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S. 324, 349 (1977).

In light of these purposes, I believe that a notice of charge adequately discloses the "date, place and circumstances of the alleged unlawful employment practice" only when it informs the respondent of the complainant's underlying reasons for filing the charge and is sufficient to permit a well-intentioned respondent to undertake immediate remedial measures if the charge is valid. It is here that I part company with the Court. I have no difficulty concluding that the notice of charge served on Shell did not meet these requirements.

The time period referred to in the EEOC's amendment to the charge can only be characterized as chosen to convey as little information as possible. It appears that the EEOC had in fact relied on Shell's employment statistics for 1970–1977, see Reply Brief for Petitioner 4 (filed Feb. 9, 1983), yet it tardily informed Shell that the "date" of the charge encompassed 1965–1981. And the allegations of discrimination in the notice of charge are so broad and unspecific as to be wholly uninformative. It is almost impossible to imagine what specific remedial actions Shell might have initiated in response to this notice of charge. It is unrealistic to expect a large employer like Shell to build a comprehensive and elaborate remedial program around a general accusation that it has failed "to recruit, hire, promote, train, assign or select" minorities and women in essentially all job categories, when in fact the charge of unlawful discrimination is grounded on far more specific and limited information. The employer surely needs to know which are the greatest problem areas, which time periods gave rise to the most troublesome statistical imbalances, what size program will be needed to rectify

the problem, what labor market the employer is expected to recruit from, and so on. Though the EEOC had carefully marshaled this information before issuing a Commissioner's charge, it categorically refused to disclose any of it to Shell.

The Court's suggestion, *ante*, at 80, that the employer "cannot plead ignorance of the figures relied upon by the Commissioner" is simply mistaken. The employer supplies only one-half of the relevant figures—its own employment statistics. The EEOC supplies the other half—overall statistics for the employment market from which the employer draws. It is only in a comparison between these two sets of figures that a pattern of discrimination becomes apparent. The relevant employment market for comparison was disputed in this case. It seems extraordinary that the EEOC should decline to provide a market definition and the comparative statistics that it works with when any remedial action must involve recruitment in that same market, at a level tailored to the seriousness of the imbalances that the EEOC believes exist at the outset.

In short, I find the EEOC's insistence on secrecy incomprehensible. The notice of charge served on Shell, and the EEOC's subsequent "stonewalling," do not serve the design and purpose of Congress to encourage prompt, voluntary correction of discriminatory employment practices. The notice and other procedural requirements of § 2000e–5(b) demand that the EEOC start with a more informative approach. There is time enough for litigation if the employer proves recalcitrant. At the outset, the EEOC's main interest should be to encourage voluntary remedial action. The statute unambiguously establishes that as the preferred course.

III

While the notice of charge to Shell was deficient, the Court of Appeals erred in suggesting that the subpoena should not be enforced until the deficiency had been rectified. Title VII places only minimal limits on the Commission's power to gain

access to information: the information must "relat[e] to unlawful employment practices" and be "relevant to the charge under investigation." 42 U. S. C. § 2000e–8(a). The material sought by the EEOC from Shell is clearly "relevant" to the pattern or practice charge that has been filed with the EEOC by Commissioner Norton. The material also "relates to unlawful employment practices" covered by Title VII. Finally, § 2000e–8(a) presupposes that the underlying charge is itself valid. The charge here was accepted by the Commission and is indisputably valid, notwithstanding its generality. As noted *supra*, at 84, the statute vests the Commission with absolute discretion to determine what constitutes a valid charge, and that discretion has not been significantly narrowed by EEOC regulations. The requirements of § 2000e–8(a) were thus fully met.

There is no direct link between the EEOC's subpoena powers and its duty to notify employers of filed charges—the notice of charge does not define the permissible scope of an EEOC investigation. The Commission's strong interest in avoiding a "minitrial" on every discovery request makes it inappropriate for the enforcement of § 2000e–8(a) discovery requests to turn, at the outset, on the EEOC's compliance with § 2000e–5(b)'s notice requirement. I agree with the Court, therefore, that the EEOC's subpoena should have been promptly enforced without more ado.

But I agree with the Court of Appeals that the EEOC has failed to comply with the notice-of-charge requirement. Accordingly, since the issue was properly raised, I believe the EEOC should be informed by the District Court that the notice was inadequate, and directed to furnish better notice. In the unlikely event that the EEOC failed or refused to comply with such an order, the District Court might consider appropriate sanctions. 42 U. S. C. § 2000e–9; 29 U. S. C. § 161.

The District Court's power to order proper notice pendent to its enforcement of the EEOC's subpoena cannot be in

doubt. The District Court clearly has jurisdiction over the subpoena enforcement action brought by the EEOC. 42 U. S. C. §§2000e–5(f)(3), 2000e–9; 29 U. S. C. §161. No principle of ripeness or exhaustion requires the District Court assiduously to ignore the EEOC's violation of the statutory notice requirement while it enforces the EEOC's investigative subpoena. The Court's decision in *FTC* v. *Standard Oil Co. of California*, 449 U. S. 232, 238–245 (1980), is not to the contrary, because there is no adequate substitute for the relief I believe the District Court should give Shell. An important statutory purpose—encouraging prompt, informal resolution of discrimination charges—will be irretrievably undermined if the District Court is barred from considering the adequacy of notice at the same proceeding in which it enforces the EEOC investigative subpoena. The dispute concerning the notice will not be resolvable at later stages of the controversy, and that in itself justifies resolving it at the first available opportunity. Cf. *id.*, at 246. The EEOC apparently does not disagree with the conclusion that the District Court may address the adequacy of notice at a subpoena enforcement proceeding. See *ante*, at 66, n. 17.

Disclosure to the employer of the information relied on by the Commissioner who files a pattern or practice charge does not open the door for litigation by an employer seeking to obstruct or delay the EEOC's investigation: the accuracy or reasonableness of a charge is not a justiciable issue at the investigatory stage. That a charge, or the information on which it is based, is erroneous, inaccurate, incomplete, misleading, false, insufficiently substantiated, outdated, or otherwise unreliable, is not relevant to the enforcement of §2000e–8(a) subpoenas, providing that the information sought is relevant to the charge filed. The statute is unambiguous: the determination whether there is "reasonable cause" to believe a charge is true is to be made at the conclusion—not at the outset—of an EEOC investigation. With this facet of the law clarified, the EEOC has no legitimate

reason to refuse to disclose the "circumstances" of a pattern or practice charge at the beginning of its investigation.

IV

In my view, a memorandum "detailing information concerning respondent's practices, the reasons for selecting the respondent (including a showing that at least one of the systemic selection standards applies to the respondent), and a description and justification of the proposed scope of the case," see EEOC Compliance Manual § 16 (1982), would more than satisfy the requirement of fair and meaningful notice. The EEOC Commissioners apparently feel the same way when it is *they* who have to be notified—it is *their* internal guidelines that require the preparation of such a memorandum before a Commissioner will sign a pattern or practice charge. There is absolutely no need or justification for supplying this information to the complainant but concealing it from the employer, who is most able to take positive and prompt remedial action.

Accordingly, I would vacate and remand with instructions that the subpoena be enforced and that the EEOC be directed to provide Shell with meaningful notice of the date and circumstances of the alleged unlawful employment practices.

LOUISIANA *v.* MISSISSIPPI ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 86, Orig. Argued January 16, 1984—Decided April 2, 1984

This original action was filed by Louisiana against Mississippi and a riparian landowner (Dille) to resolve a dispute as to the boundary between the two States in a reach of the Mississippi River. In 1970, Louisiana, acting in its capacity under Louisiana law as the owner of the riverbed out to the boundary line, executed an oil and gas lease covering the disputed area. In 1971, Dille, as the owner of riparian land in Mississippi who, under Mississippi law, has title to the riverbed out to the boundary line, executed a similar lease to the same lessee, who drilled a well directionally under the river from a surface location on Dille's land on the Mississippi side. The location of the "bottom hole" of the well—which was completed in 1972 and has been producing continuously since then—is known and agreed upon. After trial, the Special Master filed a Report, concluding that at all times during the disputed period of 1972–1982 the well's bottom hole was within Louisiana, west of wherever the boundary might have been, and that it was not necessary to delineate the specific boundary during the relevant years. Mississippi filed exceptions to the Report.

Held:

1. At all times since the completion of the well in 1972 its bottom hole has been within Louisiana. Pp. 99–106.

(a) Earlier original-jurisdiction litigation between Louisiana and Mississippi in this Court has established that the "live thalweg" of the navigable channel of the Mississippi River is the boundary between the two States. A boundary defined as the live thalweg follows the course of the stream as its bed and channel change with the gradual processes of erosion and accretion. The ordinary course of vessel traffic on the river defines the thalweg. Pp. 99–101.

(b) The Court agrees with the Special Master's conclusion, which is consistent with the testimony of Louisiana's two expert witnesses, that the live thalweg was to the east of the well's bottom-hole location for each of the years in question, thus leaving the well within Louisiana throughout the disputed period, and with his rejection of the view of Mississippi's expert witness that the boundary line migrated so as to shift the jurisdictional location of the well back and forth between the States during the relevant years. This conclusion resolves the case so far as

the Louisiana and Dille leases, and the consequences that flow therefrom, are concerned. Pp. 101–106.

2. The Master properly concluded that the only issue to be resolved centered on the location of the well's bottom hole and that it was not necessary to delineate the specific boundary in the area for each of the 11 years from 1972 to 1982. Pp. 106–108.

Exceptions to Special Master's Report overruled and Report confirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

J. I. Palmer, Jr., Special Assistant Attorney General of Mississippi, argued the cause for defendants. With him on the brief were *Bill Allain*, Attorney General, *William S. Boyd III*, Special Assistant Attorney General, and *Mitchell Emmett Ward*.

David C. Kimmel, Assistant Attorney General of Louisiana, argued the cause for plaintiff. With him on the brief were *William J. Guste*, Attorney General, *Gary L. Keyser*, Assistant Attorney General, and *Ernest S. Easterly III*.

JUSTICE BLACKMUN delivered the opinion for the Court.

This original action was filed by the State of Louisiana against the State of Mississippi and Avery B. Dille, Jr., to resolve a dispute as to the boundary between the two States in a reach of the Mississippi River above the Giles Bend Cutoff, upstream from the city of Natchez. The Report of the Special Master, however, stops short of ascertaining the entire boundary along this stretch, for the Master would have us resolve the case in Louisiana's favor with the conclusion that throughout the period 1972–1982, the years relevant to this litigation, the actually contested point—the place in the riverbed of the "bottom hole" of a particular producing oil well—at all times was west of wherever that boundary line might have been and was within the State of Louisiana. Therefore, the Special Master observes, we need go no further in bringing this controversy to an end.

Mississippi has filed exceptions to the Special Master's Report, Louisiana has filed its response to those exceptions, the

case has been argued orally, and the matter, thus, is before us for disposition.

I

In the area in question, the Mississippi River marks the boundary between Mississippi and Louisiana. See Act of Apr. 8, 1812, 2 Stat. 701, admitting Louisiana to the Union; Act of Mar. 1, 1817, 3 Stat. 348, and Joint Resolution of Dec. 10, 1817, 3 Stat. 472, admitting Mississippi to the Union. Under Mississippi law, an owner of land riparian to the Mississippi River has title to the riverbed out to the Louisiana line. *Morgan* v. *Reading*, 11 Miss. 366 (1844); *The Magnolia* v. *Marshall*, 39 Miss. 109 (1860); *Wineman* v. *Withers*, 143 Miss. 537, 547, 108 So. 708 (1926). Under Louisiana law, however, the State owns the riverbed out to the Mississippi line. *State* v. *Capdeville*, 146 La. 94, 106, 83 So. 421, 425 (1919); *Wemple* v. *Eastham*, 150 La. 247, 251, 90 So. 637, 638 (1922).

In July 1970, Louisiana, acting in its proprietary capacity, executed an oil and gas lease covering the area of the riverbed now in dispute. In January 1971, defendant Dille executed a similar lease. Each lease ran to the same operator. The lessee drilled a well directionally under the river from a surface location on riparian land owned by Dille on the Mississippi side. The well was completed in January 1972. Its bottom-hole location is known and agreed upon. See Tr. of Oral Arg. 25–26. It has been producing continuously since its completion. Mississippi acknowledges that when the well was completed and production began, the bottom hole was in Louisiana. Mississippi's Exceptions 2.

On June 20, 1979, Dille instituted suit in the Chancery Court of Adams County, Miss., against Louisiana and certain individuals and entities then holding working interests in the leasehold estates under the Dille and Louisiana leases. Dille, as plaintiff, alleged that the boundary between the States had migrated westerly so that the bottom hole of the well was within Mississippi and thus subject to the Dille

lease. The defendants in that action removed it to the United States District Court for the Southern District of Mississippi. It remains pending in that court (Civil Docket No. W79–0069(R) *sub nom. Dille* v. *Pruet & Hughes Co. (a partnership) et al.*).

Louisiana, on December 21, 1979, filed a motion with this Court for leave to file a bill of complaint against Mississippi and Dille. Although Mississippi opposed the motion, we granted leave to file. 445 U. S. 957 (1980). The Federal District Court in Mississippi, on the joint motion of the parties to the removed action, then stayed the proceedings before it pending resolution of this original-jurisdiction suit. Meanwhile, the defendants here filed their answer. We appointed Charles J. Meyers of Denver, Colo., as Special Master. 454 U. S. 937 (1981).

The Master proceeded with a pretrial conference and a schedule for discovery. A motion to intervene, filed by individuals and corporations asserting mineral interests in the Louisiana lease, was denied by the Master. By the same order, the Master specified that the proper issue for this Court to resolve was the location of the Louisiana-Mississippi boundary relative to the bottom-hole location of the oil well. On that basis, the case went to trial before the Master in New Orleans on September 20, 1982.

II

The bed of the Mississippi River between Louisiana and Mississippi has been the subject of other original-jurisdiction litigation here. See *Louisiana* v. *Mississippi*, 202 U. S. 1 (1906); *Louisiana* v. *Mississippi*, 282 U. S. 458 (1931); *Louisiana* v. *Mississippi*, 384 U. S. 24 (1966). In all three of those cases, this Court ruled that the "live thalweg" of the navigable channel of the Mississippi River was the boundary between the two States. 202 U. S., at 53; 282 U. S., at 459, 465, 467; 384 U. S., at 24, 25, 26. That issue must be regarded as settled. See Tr. of Oral Arg. 4. It forms the predicate, of course, for the present litigation.

The Giles Bend Cutoff, north of Natchez, was constructed in the 1930's. It captured the main flow of the Mississippi River, which then abandoned an old westerly bend that had marked its principal course. The cutoff, being man-made and effectuating a channel change, obviously, was avulsive; there is, however, no question here as to the state boundary in the latitude of the cutoff itself. We are concerned with the area just upstream from the cutoff.

The proposition, stated above, that the live thalweg of the navigable channel of the Mississippi River is the boundary between Louisiana and Mississippi in itself affords little help in this case and does not take us very far. Indeed, the parties do not dispute the applicable general legal principles. Mississippi itself observes that there is "no serious disagreement . . . as to the law of the case." Mississippi's Exceptions 4. See Reply Brief for Louisiana 5.

A boundary defined as the live thalweg usually will be dynamic in that it follows the course of the stream as its bed and channel change with the gradual processes of erosion and accretion. *Arkansas* v. *Tennessee*, 246 U. S. 158, 173 (1918); *Arkansas* v. *Tennessee*, 397 U. S. 88, 89–90 (1970). In contrast, however, the boundary may become fixed when, by avulsive action, the stream suddenly leaves its old bed and forms a new one. *Arkansas* v. *Tennessee*, 246 U. S., at 173, 175; *Arkansas* v. *Tennessee*, 397 U. S., at 89–90. Thus, merely to say that the live thalweg is the boundary does not lead us here to an easy conclusion, for, as Mississippi argues, that thalweg may wander, and, if it wanders far enough, the bottom hole of this particular well may find itself at different times on opposite sides of the state line.

The matter is further complicated by the fact that the definition of the term "thalweg" has not been uniform or exact. The Master notes in his Report, at 4, that this Court, in *Louisiana* v. *Mississippi*, 202 U. S., at 49, observed that the term has been defined to mean "the middle or deepest or most navigable channel," but he points out correctly that

"the middle" or the "deepest" or the "most navigable" are not necessarily one and the same. Indeed, this Court itself acknowledged this fact in *Minnesota* v. *Wisconsin*, 252 U. S. 273, 282 (1920) ("Deepest water and the principal navigable channel are not necessarily the same"). The doctrine of the thalweg has evolved from the presumed intent of Congress in establishing state boundaries, and has roots in international law and in the concept of equality of access. *Iowa* v. *Illinois*, 147 U. S. 1 (1893). See *Texas* v. *Louisiana*, 410 U. S. 702, 709–710 (1973).

What emerges from the cases, however, is the proposition that the live thalweg is at "the middle of the principal [channel], or, rather, the one usually followed." *Iowa* v. *Illinois*, 147 U. S., at 13; *Minnesota* v. *Wisconsin*, 252 U. S., at 282. See *New Jersey* v. *Delaware*, 291 U. S. 361, 379 (1934). As the Master observed, and as the parties appear to agree, "the thalweg defines the boundary, and the ordinary course of traffic on the river defines the thalweg." Report, at 6. Our task, therefore, is to identify the downstream course of river traffic. It appears to us, as it did to the Master, to be a matter of evidence as to the course commonly taken downstream by vessels navigating the particular reach of the river. It is to the evidence that we now turn.

III

Three witnesses testified before the Master and did so at length. Each qualified as an expert. Two, Hatley N. Harrison, Jr., and Leo Odom, were presented by Louisiana. The third, Austin B. Smith, was presented by Mississippi. Each is a trained engineer who has spent much of his professional career attending to problems related to the surveying and mapping of rivers, river navigation, and flood control. The Master concluded that, despite questions raised by Mississippi as to the witnesses' relative qualifications, each had "professional qualifications needed to identify, interpret, and evaluate data relevant to the problem of locating the live

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thalweg in the disputed reach of the river" and that each "did a commendable job." *Id.*, at 7. We carefully have reviewed their testimony before the Master, and we have no reason to disagree with the Master's evaluation of their respective qualifications or with his observation as to the commendableness of their performances as witnesses.

Over 100 exhibits were admitted in evidence in conjunction with the testimony of the three experts. In particular, hydrographic surveys for each of the years 1972–1982 were admitted; these were prepared by the United States Army Corps of Engineers. The surveys contained data as to soundings, average low-water plane, contour lines, and gauge data. They noted the location of lights placed by the Coast Guard as an aid to navigation. Some also noted the location of buoys and floats that served to indicate the direction and relative velocity of the current. Louisiana introduced channel reports issued by the Coast Guard during the years 1976–1982; these were based on soundings and recommended a course by reference to lights and buoys.

The Master observed, *id.*, at 10, that the hydrographic surveys provided the general characteristics of the disputed reach of the river. The area is approximately four miles long. Its general shape is an elbow-like bend with the concave bank on the Mississippi side. The bottom-hole location of the well is approximately one mile downstream from the point of the bend. The Gibson Light is about two and one-half miles upstream from that point. An uninterrupted trough of deep water never has been present in the disputed area. A trough of deep water, however, generally lies along the Louisiana bank, upstream from the point of the bend. Another trough lies along the Mississippi bank downstream from the point of the elbow. The riverbed, however, "rises markedly between the two troughs of deep water," *id.*, at 11, and during each of the years in question downstream traffic has had to traverse a "crossing" of shallower water between the troughs. It is as to the navigation of this crossing that the expert witnesses disagreed.

The sailing line or live thalweg placed on the hydrographic surveys by Louisiana's witness Harrison passed to the east of the bottom-hole location of the well for each of the years 1972–1982; it thus left the well within the State of Louisiana throughout that period.

Louisiana's other witness, Odom, took a somewhat different approach. He offered as the preferred sailing line, or live thalweg, a channel depicted on a particular map transposed onto the hydrographic surveys. His line and Harrison's line do not coincide. Odom's version, however, as did Harrison's, had the transposed channel line always well to the east of the bottom-hole location of the well. In other words, under witness Odom's version, too, the bottom hole always was west of the boundary and within Louisiana.

Mississippi's witness Smith followed another path. He stressed three factors: the downstream course, the track of navigation, and the thalweg. The first two, he indicated, are closely related and perhaps identical. The track of navigation can be established from navigational aids, such as lights and bulletins to mariners. The thalweg, however, is the line of deepest and swiftest water. It could be determined by the sounding and contour lines on the hydrographic surveys. Witness Smith did not explicitly use the navigational aids to determine the track of navigation. Instead, he determined the live course according to the thalweg evidence on the surveys. Thus, his method was to place the boundary along the line of deepest and swiftest water that he was able to discern from the soundings and contour lines. He applied this method to all reaches of the stream including the crossing.

Smith's approach placed the boundary line to the east of the bottom hole during the years 1972–1974. He, however, had the boundary line meander west so that it passed over the bottom hole on January 11, 1975. He had it then move east so that it passed over the bottom hole in that direction on December 20, 1977. Again, he had it move west and pass over the hole on April 10, 1981, and then to the east over the

hole on December 5, 1981. He thus presented a migrating boundary line that shifted the jurisdictional location of the well back and forth between the States. As previously noted, the Louisiana witnesses had the boundary line always to the east of the well. The witnesses therefore were in conflict with respect to the years 1975, 1976, 1977, and 1981.

The Master, in his Report, at 16–30, reviewed in detail and carefully analyzed the evidence for the disputed years. He noted that any inference as to the migration of the boundary must be made by reference to the navigational lights, the changing water depths, and the configuration of the riverbed as revealed by the surveys. *Id.*, at 17. As to 1975, he had problems with Mr. Smith's testimony as to the manner in which a navigator would proceed downstream between the Gibson Light and the Giles Bend Cutoff Light, and as to a failure to take advantage of the first 3,500 feet of the lower trough of deep water.

As to 1976, the Master felt that witness Smith's boundary line was plausible as an indicator of the probable route of downstream traffic in the ordinary course. *Id.*, at 25. The Master concluded, however, that maximum use of deep water led to a sailing line similar to the one the Master inferred for 1975; this also would have allowed the mariner to keep his tow pointed down river with no sharp turns and without encountering hazardous water within the crossing environment. He noted that a mariner proceeding along witness Smith's boundary line would nearly overrun a black buoy (ordinarily to be given a wide berth on the starboard side going downstream) and would have a second black buoy to port as he passed that buoy. *Id.*, at 26. Mr. Smith defended this position on the ground that the second buoy appeared to be off station.

As to 1977, Mr. Smith's boundary line reflected a straight course across the neck of Giles Bend and passed to the west of the well by 750 feet. *Id.*, at 27. The Master found "no evidence in the record" to support this placement of the line. *Ibid.*

As to 1981, while a course along Mr. Smith's boundary line would encounter no hazards within the crossing, the Master observed that it would fail to make use of substantial portions of the deep-water troughs and thereby would lengthen the crossing. *Id.*, at 29.

Thus, for the disputed years, the Master found either that the Smith line did not conform to the data available on the surveys, or that it was not conceivable that a mariner would adopt Smith's track of navigation and disregard important navigational aids such as lights and buoys, or that the Smith line failed to utilize substantial stretches of deep water, or that it bore little or no relationship to the course recommended by the Coast Guard. For each of those years, the Master then concluded that the route of the downstream traffic in the ordinary course passed to the east of the well.

Mississippi, of course, takes exception to the Master's conclusions. It stresses what it regards as the unparalleled expertise of witness Smith as a potamologist with decades of specific experience in the field. Mississippi suggests that the Master failed to understand Smith's testimony. Exceptions, at 11. It is said that witness Smith used all, not just part, of the data submitted. It is said that the Master did not grasp the concept of "filling the marks" and "breaking the tow down." Mississippi urges that the Master was in error in concluding that Smith did not use the navigational aids. All were used by Smith, it claims, in interpreting the hydrographic raw data. *Id.*, at 20. It asserts that for 1975 Mr. Smith was correct in picking a course that took advantage of the deep water, the swift water, and the shortest distance through the crossing. *Id.*, at 29. It says the same thing as to 1976. It stresses Smith's conclusion that the one black buoy was off station and that witness Odom's so-called "geological thalweg," that is, the deepest part of the river, also runs over the same black buoy. As to 1981, Mississippi asserts that there is no factual basis for the Master's statement that Smith's course lengthened the crossing. It is the Master's course that necessitated sharp turns. Thus, it is

claimed, the Master's course does not square with either the data or the "practical realities of navigating large tows on the river." *Id.*, at 37.

These recitals, it seems to us, reveal the presence of a not unusual situation. Qualified experts differed in their conclusions. The Master heard all the testimony and drew his own conclusions. His recommendations to this Court are based on those conclusions. We have made our own independent review of that record and find ourselves in agreement with the Master. Louisiana's experts interpreted the hydrographic surveys for the years in question. They also considered the recommended sailing course as established by the Coast Guard. To be sure, the Coast Guard is not in the business of establishing state boundaries; it is, however, in the business of recommending safe sailing courses.

We therefore confirm the Master's recommendation and conclude that at all relevant times during the period from 1972–1982 the boundary between Mississippi and Louisiana was east of the bottom hole and, therefore, that the bottom hole was to the west of that line and within the State of Louisiana. This conclusion obviously resolves the case so far as the Louisiana and Dille leases, and the consequences that flow therefrom, are concerned.

IV

Mississippi's objections are addressed secondarily to the Master's refusal to delineate a specific boundary in the area for each of the 11 years from 1972 to 1982. It asserts that the Master's statement, Report, at 31, that the issue from the very beginning of the litigation has been "the location of the boundary in relation to the bottom hole" is, "in the purest sense, . . . simply not true." Exceptions, at 38. The principal issue, thus, "floats amorphous in the ether." *Id.*, at 39. Mississippi speaks of regulatory and taxing authority and of the problem of the drainage of oil from the Dille property. It is said that Mississippi must have the exact location of the boundary so as to prescribe the limits of drilling units on the

Mississippi side of the river. A precise determination would also inure to the benefit of Louisiana. Mississippi asserts that Louisiana really requested this determination all along.

The Master specifically declined "to draw my own version of the boundary line for each of the 11 years for which hydrographs were admitted in evidence." Report, at 31. For him, it would be "wholly gratuitous and improper to draw a boundary line for seven undisputed years and for four years in which the well was found to be on the Louisiana side." *Id.*, at 32.

We agree with the Master's conclusion that, despite any inferences that otherwise might flow from the specific prayer for relief in Louisiana's complaint, this original-jurisdiction litigation, as the case developed, centered, and remained centered, on the oil well's bottom hole. That issue emerged as the one, and the only one, to be resolved. Mississippi's stated reasons for granting complete yearly boundary relief are not persuasive, for we perceive no controversy before us apart from the location of the bottom hole. A proposed boundary decree for the entire stretch at the most would determine where the boundary was, not where it is now or where it will be in the future. Mississippi concedes that a boundary fixed for 1982 "would not be the boundary after [that year]," Tr. of Oral Arg. 9; that Mississippi was not making any claim for taxes for the 11 years, *id.*, at 20; that it had not established drilling units on the Mississippi side, *id.*, at 21; and that possible drainage of oil from the Dille land was Dille's "private concern . . . not the concern of the state," *id.*, at 11–12. We are given no consequence that would flow from a more particularized boundary determination for these 11 years of the past.

The situation, of course, would be different, at least as to some of the years, had witness Smith's views prevailed. And if and when the boundary moves far enough west to place the well in Mississippi, then that State would have power to tax or to regulate the flow of oil, and drilling units perhaps would become pertinent. But the exact location of

the boundary in 1982 and earlier years has little bearing on evidence that might be produced in the future as to the boundary in that future. Taxes, and the other items referred to, have assumed no posture of critical significance between the two States for 1972–1982, and there has been no special claim identified for that period. It was the producing well's location that was the prize. If other boundary consequences mature and really come to issue between the States, either, of course, is free to institute appropriate litigation for their resolution.

V

The exceptions of Mississippi, therefore, are overruled. The recommendations of the Special Master are adopted and his Report is confirmed. We hold that at all times since the completion of the well in 1972 its bottom hole has been within the State of Louisiana.

If a specific decree to this effect is needed or desired, any party may prepare a decree and submit it for this Court's consideration.

It is so ordered.

Syllabus

UNITED STATES *v.* JACOBSEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82–1167. Argued December 7, 1983—Decided April 2, 1984

During their examination of a damaged package, consisting of a cardboard box wrapped in brown paper, the employees of a private freight carrier observed a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside the package. The employees then notified the Drug Enforcement Administration (DEA), replaced the plastic bags in the tube, and put the tube back into the box. When a DEA agent arrived, he removed the tube from the box and the plastic bags from the tube, saw the white powder, opened the bags, removed a trace of the powder, subjected it to a field chemical test, and determined it was cocaine. Subsequently, a warrant was obtained to search the place to which the package was addressed, the warrant was executed, and respondents were arrested. After respondents were indicted for possessing an illegal substance with intent to distribute, their motion to suppress the evidence on the ground that the warrant was the product of an illegal search and seizure was denied, and they were tried and convicted. The Court of Appeals reversed, holding that the validity of the warrant depended on the validity of the warrantless test of the white powder, that the testing constituted a significant expansion of the earlier private search, and that a warrant was required.

Held: The Fourth Amendment did not require the DEA agent to obtain a warrant before testing the white powder. Pp. 113–126.

(a) The fact that employees of the private carrier independently opened the package and made an examination that might have been impermissible for a Government agent cannot render unreasonable otherwise reasonable official conduct. Whether those employees' invasions of respondents' package were accidental or deliberate or were reasonable or unreasonable, they, because of their private character, did not violate the Fourth Amendment. The additional invasions of respondents' privacy by the DEA agent must be tested by the degree to which they exceeded the scope of the private search. Pp. 113–118.

(b) The DEA agent's removal of the plastic bags from the tube and his visual inspection of their contents enabled him to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment. Although the agent's assertion of dominion and control over the package and its contents constituted a

"seizure," the seizure was reasonable since it was apparent that the tube and plastic bags contained contraband and little else. In light of what the agent already knew about the contents of the package, it was as if the contents were in plain view. It is constitutionally reasonable for law enforcement officials to seize "effects" that cannot support a justifiable expectation of privacy without a warrant based on probable cause to believe they contain contraband. Pp. 118–122.

(c) The DEA agent's field test, although exceeding the scope of the private search, was not an unlawful "search" or "seizure" within the meaning of the Fourth Amendment. Governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest. *United States* v. *Place*, 462 U. S. 696. The destruction of the white powder during the course of the field test was reasonable. The law enforcement interests justifying the procedure were substantial, whereas, because only a trace amount of material was involved and the property had already been lawfully detained, the warrantless "seizure" could have only a *de minimis* impact on any protected property interest. Under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests. Pp. 122–125.

683 F. 2d 296, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 126. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 133.

David A. Strauss argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Mark W. Peterson argued the cause and filed a brief for respondents.*

**Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Howard G. Berringer*, *David Crump*, *Daniel B. Hales*, *William B. Randall*, and *Evelle J. Younger* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

John Kenneth Zwerling filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

JUSTICE STEVENS delivered the opinion of the Court.

During their examination of a damaged package, the employees of a private freight carrier observed a white powdery substance, originally concealed within eight layers of wrappings. They summoned a federal agent, who removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine. The question presented is whether the Fourth Amendment required the agent to obtain a warrant before he did so.

The relevant facts are not in dispute. Early in the morning of May 1, 1981, a supervisor at the Minneapolis-St. Paul Airport Federal Express office asked the office manager to look at a package that had been damaged and torn by a forklift. They then opened the package in order to examine its contents pursuant to a written company policy regarding insurance claims.

The container was an ordinary cardboard box wrapped in brown paper. Inside the box five or six pieces of crumpled newspaper covered a tube about 10 inches long; the tube was made of the silver tape used on basement ducts. The supervisor and office manager cut open the tube, and found a series of four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder. When they observed the white powder in the innermost bag, they notified the Drug Enforcement Administration. Before the first DEA agent arrived, they replaced the plastic bags in the tube and put the tube and the newspapers back into the box.

When the first federal agent arrived, the box, still wrapped in brown paper, but with a hole punched in its side and the top open, was placed on a desk. The agent saw that one end of the tube had been slit open; he removed the four plastic bags from the tube and saw the white powder. He then opened each of the four bags and removed a trace of the

white substance with a knife blade. A field test made on the spot identified the substance as cocaine.[1]

In due course, other agents arrived, made a second field test, rewrapped the package, obtained a warrant to search the place to which it was addressed, executed the warrant, and arrested respondents. After they were indicted for the crime of possessing an illegal substance with intent to distribute, their motion to suppress the evidence on the ground that the warrant was the product of an illegal search and seizure was denied; they were tried and convicted, and appealed. The Court of Appeals reversed. 683 F. 2d 296 (CA8 1982). It held that the validity of the search warrant depended on the validity of the agents' warrantless test of the white powder,[2] that the testing constituted a significant expansion of the earlier private search, and that a warrant was required.

As the Court of Appeals recognized, its decision conflicted with a decision of another Court of Appeals on comparable facts, *United States* v. *Barry*, 673 F. 2d 912 (CA6), cert. denied, 459 U. S. 927 (1982).[3] For that reason, and because

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[1] As the test is described in the evidence, it involved the use of three test tubes. When a substance containing cocaine is placed in one test tube after another, it will cause liquids to take on a certain sequence of colors. Such a test discloses whether or not the substance is cocaine, but there is no evidence that it would identify any other substances.

[2] The Court of Appeals did not hold that the facts would not have justified the issuance of a warrant without reference to the test results; the court merely held that the facts recited in the warrant application, which relied almost entirely on the results of the field tests, would not support the issuance of the warrant if the field test was itself unlawful. "'It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention.'" *Spinelli* v. *United States*, 393 U. S. 410, 413, n. 3 (1969) (emphasis in original) (quoting *Aguilar* v. *Texas*, 378 U. S. 108, 109, n. 1 (1964)). See *Illinois* v. *Gates*, 462 U. S. 213, 238–239 (1983).

[3] See also *People* v. *Adler*, 50 N. Y. 2d 730, 409 N. E. 2d 888, cert. denied, 449 U. S. 1014 (1980); cf. *United States* v. *Andrews*, 618 F. 2d 646 (CA10) (upholding warrantless field test without discussion), cert. denied, 449 U. S. 824 (1980).

field tests play an important role in the enforcement of the narcotics laws, we granted certiorari, 460 U. S. 1021.

I

The first Clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.[4] A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.[5] This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Walter* v.

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[4] See *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983); *United States* v. *Knotts*, 460 U. S. 276, 280–281 (1983); *Smith* v. *Maryland*, 442 U. S. 735, 739–741 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968).

[5] See *United States* v. *Place*, 462 U. S. 696 (1983); *id.*, at 716 (BRENNAN, J., concurring in result); *Texas* v. *Brown*, 460 U. S. 730, 747–748 (1983) (STEVENS, J., concurring in judgment); see also *United States* v. *Chadwick*, 433 U. S. 1, 13–14, n. 8 (1977); *Hale* v. *Henkel*, 201 U. S. 43, 76 (1906). While the concept of a "seizure" of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the "seizure" of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement. See *Michigan* v. *Summers*, 452 U. S. 692, 696 (1981); *Reid* v. *Georgia*, 448 U. S. 438, 440, n. (1980) *(per curiam)*; *United States* v. *Mendenhall*, 446 U. S. 544, 551–554 (1980) (opinion of Stewart, J.); *Brown* v. *Texas*, 443 U. S. 47, 50 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *Cupp* v. *Murphy*, 412 U. S. 291, 294–295 (1973); *Davis* v. *Mississippi*, 394 U. S. 721, 726–727 (1969); *Terry* v. *Ohio*, 392 U. S., at 16, 19, n. 16.

United States, 447 U. S. 649, 662 (1980) (BLACKMUN, J., dissenting).[6]

When the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an "effect" within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.[7] Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.[8] Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered.[9] Conversely, in this case the fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent

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[6] See 447 U. S., at 656 (opinion of STEVENS, J.); *id.*, at 660–661 (WHITE, J., concurring in part and concurring in judgment); *United States* v. *Janis*, 428 U. S. 433, 455–456, n. 31 (1976); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490 (1971); *Burdeau* v. *McDowell*, 256 U. S. 465 (1921).

[7] *United States* v. *Chadwick*, 433 U. S. 1, 10 (1977); *United States* v. *Van Leeuwen*, 397 U. S. 249, 251 (1970); *Ex parte Jackson*, 96 U. S. 727, 733 (1878); see also *Walter*, 447 U. S., at 654–655 (opinion of STEVENS, J.).

[8] See, *e. g.*, *United States* v. *Place*, 462 U. S., at 701; *United States* v. *Ross*, 456 U. S. 798, 809–812 (1982); *Robbins* v. *California*, 453 U. S. 420, 426 (1981) (plurality opinion); *Arkansas* v. *Sanders*, 442 U. S. 753, 762 (1979); *United States* v. *Chadwick*, 433 U. S., at 13, and n. 8; *United States* v. *Van Leeuwen*, *supra*. There is, of course, a well-recognized exception for customs searches; but that exception is not involved in this case.

[9] See *Whiteley* v. *Warden*, 401 U. S. 560, 567, n. 11 (1971); *Wong Sun* v. *United States*, 371 U. S. 471, 484 (1963); *Rios* v. *United States*, 364 U. S. 253, 261–262 (1960); *Henry* v. *United States*, 361 U. S. 98, 103 (1959); *Miller* v. *United States*, 357 U. S. 301, 312 (1958); *United States* v. *Di Re*, 332 U. S. 581, 595 (1948); *Byars* v. *United States*, 273 U. S. 28, 29 (1927).

cannot render otherwise reasonable official conduct unreasonable. The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred.

The initial invasions of respondents' package were occasioned by private action. Those invasions revealed that the package contained only one significant item, a suspicious looking tape tube. Cutting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder. Whether those invasions were accidental or deliberate,[10] and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.

The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search. That standard was adopted by a majority of the Court in *Walter* v. *United States*, *supra*. In *Walter* a private party had opened a misdirected carton, found rolls of motion picture films that appeared to be contraband, and turned the carton over to the Federal Bureau of Investigation. Later, without obtaining a warrant, FBI agents obtained a projector and viewed the films. While there was no single opinion of the Court, a majority did agree on the appropriate analysis of a governmental search which follows on the heels of a private one. Two Justices took the position:

> "If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any offi-

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[10] A post-trial affidavit indicates that an agent of Federal Express may have opened the package because he was suspicious about its contents, and not because of damage from a forklift. However, the lower courts found no governmental involvement in the private search, a finding not challenged by respondents. The affidavit thus is of no relevance to the issue we decide.

cial use of a private party's invasion of another person's privacy. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search." *Id.*, at 657 (opinion of STEVENS, J., joined by Stewart, J.) (footnote omitted).[11]

Four additional Justices, while disagreeing with this characterization of the scope of the private search, were also of the view that the legality of the governmental search must be tested by the scope of the antecedent private search.

"'Under these circumstances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not "change the nature of the search" and was not an additional search subject to the warrant requirement.'" *Id.*, at 663–664 (BLACKMUN, J., dissenting, joined by BURGER, C. J., and POWELL and REHNQUIST, JJ.) (footnote omitted) (quoting *United States* v. *Sanders*, 592

[11] See also 447 U. S., at 658–659 (footnotes omitted) ("The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection").

F. 2d 788, 793–794 (CA5 1979) (case below in *Walter*).[12]

This standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities. It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed." *United States* v. *Miller*, 425 U. S. 435, 443 (1976).[13] The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a pri-

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[12] In *Walter*, a majority of the Court found a violation of the Fourth Amendment. For present purposes, the disagreement between the majority and the dissenters in that case with respect to the comparison between the private search and the official search is less significant than the agreement on the standard to be applied in evaluating the relationship between the two searches.

[13] See *Smith* v. *Maryland*, 442 U. S. 735, 743–744 (1979); *United States* v. *White*, 401 U. S. 745, 749–753 (1971) (plurality opinion); *Osborn* v. *United States*, 385 U. S. 323, 326–331 (1966); *Hoffa* v. *United States*, 385 U. S. 293, 300–303 (1966); *Lewis* v. *United States*, 385 U. S. 206 (1966); *Lopez* v. *United States*, 373 U. S. 427, 437–439 (1963); *On Lee* v. *United States*, 343 U. S. 747, 753–754 (1952). See also *United States* v. *Henry*, 447 U. S. 264, 272 (1980); *United States* v. *Caceres*, 440 U. S. 741, 744, 750–751 (1979).

vate search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.[14]

In this case, the federal agents' invasions of respondents' privacy involved two steps: first, they removed the tube from the box, the plastic bags from the tube, and a trace of powder from the innermost bag; second, they made a chemical test of the powder. Although we ultimately conclude that both actions were reasonable for essentially the same reason, it is useful to discuss them separately.

II

When the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder. It is not entirely clear that the powder was visible to him before he removed the tube from the box.[15] Even if the white

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[14] See *Katz* v. *United States*, 389 U. S. 347 (1967); *Berger* v. *New York*, 388 U. S. 41 (1967); *Silverman* v. *United States*, 365 U. S. 505 (1961).

[15] Daniel Stegemoller, the Federal Express office manager, testified at the suppression hearing that the white substance was not visible without reentering the package at the time the first agent arrived. App. 42–43, 58. As JUSTICE WHITE points out, the Magistrate found that the "tube was in plain view in the box and the bags with the white powder were visible from the end of the tube." App. to Pet. for Cert. 18a. The bags were, however, only visible if one picked up the tube and peered inside through a small aperture; even then, what was visible was only the translucent bag that contained the white powder. The powder itself was barely visible, and surely was not so plainly in view that the agents did "no more than fail to avert their eyes," *post*, at 130. In any event, respondents filed objections to the Magistrate's report with the District Court. The District Court declined to resolve respondents' objections, ruling that fact immaterial and assuming for purposes of its decision "that the newspaper in the box covered the gray tube and that neither the gray tube nor the contraband could be seen when the box was turned over to the . . . DEA agents." App. to Pet. for Cert. 12a–13a. At trial, the federal agent first on the scene testified that the powder was not visible until after he pulled the plastic bags out of the tube. App. 71–72. Respondents continue to argue this case on the assumption that the Magistrate's report is incorrect. Brief for Respondents 2–3. As our discussion will make clear, we agree with the

powder was not itself in "plain view" because it was still enclosed in so many containers and covered with papers, there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. Respondents do not dispute that the Government could utilize the Federal Express employees' testimony concerning the contents of the package. If that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection, rather than in further infringing respondents' privacy. Protecting the risk of misdescription hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment.[16] Respondents could have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents. The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amend-

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District Court that it does not matter whether the loose pieces of newspaper covered the tube at the time the agent first saw the box.

[16] See *United States* v. *Caceres*, 440 U. S., at 750–751; *United States* v. *White*, 401 U. S., at 749–753 (plurality opinion); *Osborn* v. *United States*, 385 U. S., at 326–331; *On Lee* v. *United States*, 343 U. S., at 753–754. For example, in *Lopez* v. *United States*, 373 U. S. 427 (1963), the Court wrote: "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence . . . . For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court . . . ." *Id.*, at 439 (footnote omitted).

ment. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490 (1971); *Burdeau* v. *McDowell*, 256 U. S. 465, 475–476 (1921).

Similarly, the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search.[17] It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment.

While the agents' assertion of dominion and control over the package and its contents did constitute a "seizure,"[18] that

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[17] We reject JUSTICE WHITE's suggestion that this case is indistinguishable from one in which the police simply learn from a private party that a container contains contraband, seize it from its owner, and conduct a warrantless search which, as JUSTICE WHITE properly observes, would be unconstitutional. Here, the Federal Express employees who were lawfully in possession of the package invited the agent to examine its contents; the governmental conduct was made possible only because private parties had compromised the integrity of this container. JUSTICE WHITE would have this case turn on the fortuity of whether the Federal Express employees placed the tube back into the box. But in the context of their previous examination of the package, their communication of what they had learned to the agent, and their offer to have the agent inspect it, that act surely could not create any privacy interest with respect to the package that would not otherwise exist. See *Illinois* v. *Andreas*, 463 U. S., at 771–772. Thus the precise character of the white powder's visibility to the naked eye is far less significant than the facts that the container could no longer support any expectation of privacy, and that it was virtually certain that it contained nothing but contraband. Contrary to JUSTICE WHITE's suggestion, we do not "sanctio[n] warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search." *Post*, at 129. A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant. See *United States* v. *Ross*, 456 U. S., at 809–812; *Robbins* v. *California*, 453 U. S., at 426–427 (plurality opinion); *Arkansas* v. *Sanders*, 442 U. S., at 764–765; *United States* v. *Chadwick*, 433 U. S. 1 (1977).

[18] Both the Magistrate and the District Court found that the agents took custody of the package from Federal Express after they arrived. Al-

seizure was not unreasonable. The fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised is highly relevant to the reasonableness of the agents' conduct in this respect. The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could no longer support any expectation of privacy; it was just like a balloon "the distinctive character [of which] spoke volumes as to its contents—particularly to the trained eye of the officer," *Texas* v. *Brown*, 460 U. S. 730, 743 (1983) (plurality opinion); see also *id.*, at 746 (POWELL, J., concurring in judgment); or the hypothetical gun case in *Arkansas* v. *Sanders*, 442 U. S. 753, 764–765, n. 13 (1979). Such containers may be seized, at least temporarily, without a warrant.[19] Accordingly, since it was apparent that the tube and plastic bags contained contraband and little else, this warrantless seizure was reasonable,[20] for it is well settled that it is constitutionally reasonable for law enforcement officials to seize "effects" that cannot support a justifiable expec-

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though respondents had entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a "seizure," though not necessarily an unreasonable one. See *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970). Indeed, this is one thing on which the entire Court appeared to agree in *Walter* v. *United States*, 447 U. S. 649 (1980).

[19] See also *United States* v. *Ross*, 456 U. S., at 822–823; *Robbins* v. *California*, 453 U. S., at 428 (plurality opinion).

[20] Respondents concede that the agents had probable cause to believe the package contained contraband. Therefore we need not decide whether the agents could have seized the package based on something less than probable cause. Some seizures can be justified by an articulable suspicion of criminal activity. See *United States* v. *Place*, 462 U. S. 696 (1983).

tation of privacy without a warrant, based on probable cause to believe they contain contraband.[21]

III

The question remains whether the additional intrusion occasioned by the field test, which had not been conducted by the Federal Express employees and therefore exceeded the scope of the private search, was an unlawful "search" or "seizure" within the meaning of the Fourth Amendment.

The field test at issue could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder. We must first determine whether this can be considered a "search" subject to the Fourth Amendment—did it infringe an expectation of privacy that society is prepared to consider reasonable?

The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.[22] Indeed, this distinction underlies the rule that

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[21] See *Place*, 462 U. S., at 701–702; *Texas* v. *Brown*, 460 U. S., at 741–742 (plurality opinion); *id.*, at 748 (STEVENS, J., concurring in judgment); *Payton* v. *New York*, 445 U. S. 573, 587 (1980); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354 (1977); *Harris* v. *United States*, 390 U. S. 234, 236 (1968) *(per curiam)*.

[22] "Obviously, however, a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' His presence, in the words of *Jones* [v. *United States*, 362 U. S. 257, 267 (1960)], is 'wrongful'; his expectation [of privacy] is not 'one that society is prepared to recognize as "reasonable."' *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring). And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside

government may utilize information voluntarily disclosed to a governmental informant, despite the criminal's reasonable expectation that his associates would not disclose confidential information to the authorities. See *United States* v. *White*, 401 U. S. 745, 751–752 (1971) (plurality opinion).

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.[23]

This conclusion is dictated by *United States* v. *Place*, 462 U. S. 696 (1983), in which the Court held that subjecting luggage to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment:

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of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978). See also *United States* v. *Knotts*, 460 U. S. 276 (1983) (use of a beeper to track car's movements infringed no reasonable expectation of privacy); *Smith* v. *Maryland*, 442 U. S. 735 (1979) (use of a pen register to record phone numbers dialed infringed no reasonable expectation of privacy).

[23] See Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich. L. Rev. 1229 (1983). Our discussion, of course, is confined to possession of contraband. It is not necessarily the case that the purely "private" possession of an article that cannot be distributed in commerce is itself illegitimate. See *Stanley* v. *Georgia*, 394 U. S. 557 (1969).

"A 'canine sniff' by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited." *Id.*, at 707.[24]

Here, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

We have concluded, in Part II, *supra*, that the initial "seizure" of the package and its contents was reasonable. Nevertheless, as *Place* also holds, a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the the Fourth Amendment's prohibition on "unreasonable seizures."[25] Here, the field test did affect respondents' possessory interests protected by the Amendment, since by destroying a quantity of the powder it con-

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[24] Respondents attempt to distinguish *Place*, arguing that it involved no physical invasion of Place's effects, unlike the conduct at issue here. However, as the quotation makes clear, the *reason* this did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items. That rationale is fully applicable here.

[25] In *Place*, the Court held that while the initial seizure of luggage for the purpose of subjecting it to a "dog sniff" test was reasonable, the seizure became unreasonable because its length unduly intruded upon constitutionally protected interests. See *id.*, at 707–710.

verted what had been only a temporary deprivation of possessory interests into a permanent one. To assess the reasonableness of this conduct, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." 462 U. S., at 703.[26]

Applying this test, we conclude that the destruction of the powder during the course of the field test was reasonable. The law enforcement interests justifying the procedure were substantial; the suspicious nature of the material made it virtually certain that the substance tested was in fact contraband. Conversely, because only a trace amount of material was involved, the loss of which appears to have gone unnoticed by respondents, and since the property had already been lawfully detained, the "seizure" could, at most, have only a *de minimis* impact on any protected property interest. Cf. *Cardwell* v. *Lewis*, 417 U. S. 583, 591–592 (1974) (plurality opinion) (examination of automobile's tires and taking of paint scrapings was a *de minimis* invasion of constitutional interests).[27] Under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests. This warrantless "seizure" was reasonable.[28]

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[26] See, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1046–1047 (1983); *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S., at 878; *Terry* v. *Ohio*, 392 U. S., at 20–21; *Camara* v. *Municipal Court*, 387 U. S. 523, 536–537 (1967).

[27] In fact, respondents do not contend that the amount of material tested was large enough to make it possible for them to have detected its loss. The only description in the record of the amount of cocaine seized is that "[i]t was a trace amount." App. 75.

[28] See *Cupp* v. *Murphy*, 412 U. S. 291, 296 (1973) (warrantless search and seizure limited to scraping suspect's fingernails justified even when full search may not be). Cf. *Place*, 462 U. S., at 703–706 (approving brief warrantless seizure of luggage for purposes of "sniff test" based on its minimal intrusiveness and reasonable belief that the luggage contained contraband); *United States* v. *Van Leeuwen*, 397 U. S., at 252–253 (detention of package on reasonable suspicion was justified since detention infringed no

In sum, the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct. To the extent that a protected possessory interest was infringed, the infringement was *de minimis* and constitutionally reasonable. The judgment of the Court of Appeals is

Reversed.

JUSTICE WHITE, concurring in part and concurring in the judgment.

It is relatively easy for me to concur in the judgment in this case, since in my view the case should be judged on the basis of the Magistrate's finding that, when the first DEA agent arrived, the "tube was in plain view in the box and the bags with the white powder were visible from the end of the tube." App. to Pet. for Cert. 18a. Although this finding was challenged before the District Court, that court found it unnecessary to pass on the issue. *Id.*, at 12a–13a. As I understand its opinion, however, the Court of Appeals accepted the Magistrate's finding: the Federal Express manager "placed the bags back in the tube, leaving them visible from the tube's end, and placed the tube back in the box"; he later gave the box to the DEA agent, who "removed the tube from the open box, took the bags out of the tube, and extracted a sample of the powder." 683 F. 2d 296, 297 (CA8 1982). At the very least, the Court of Appeals assumed that

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"significant Fourth Amendment interest"). Of course, where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances. See, *e. g.*, *Steagald* v. *United States*, 451 U. S. 204 (1981); *Payton* v. *New York*, 445 U. S. 573 (1980); *Dunaway* v. *New York*, 442 U. S. 200 (1979); *United States* v. *Chadwick*, 433 U. S. 1 (1977). We do not suggest, however, that any seizure of a small amount of material is necessarily reasonable. An agent's arbitrary decision to take the "white powder" he finds in a neighbor's sugar bowl, or his medicine cabinet, and subject it to a field test for cocaine, might well work an unreasonable seizure.

the contraband was in plain view. The Court of Appeals then proceeded to consider whether the federal agent's field test was an illegal extension of the private search, and it invalidated the field test solely for that reason.

Particularly since respondents argue here that whether or not the contraband was in plain view when the federal agent arrived is irrelevant and that the only issue is the validity of the field test, see, *e. g.*, Brief for Respondents 25, n. 11; Tr. of Oral Arg. 28, I would proceed on the basis that the clear plastic bags were in plain view when the agent arrived and that the agent thus properly observed the suspected contraband. On that basis, I agree with the Court's conclusion in Part III that the Court of Appeals erred in holding that the type of chemical test conducted here violated the Fourth Amendment.

The Court, however, would not read the Court of Appeals' opinion as having accepted the Magistrate's finding. It refuses to assume that the suspected contraband was visible when the first DEA agent arrived on the scene, conducts its own examination of the record, and devotes a major portion of its opinion to a discussion that would be unnecessary if the facts were as found by the Magistrate. The Court holds that even if the bags were not visible when the agent arrived, his removal of the tube from the box and the plastic bags from the tube and his subsequent visual examination of the bags' contents "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment" because these actions "enabled the agent to learn nothing that had not previously been learned during the private search." *Ante*, at 120 (footnote omitted). I disagree with the Court's approach for several reasons.

First, as I have already said, respondents have abandoned any attack on the Magistrate's findings; they assert that it is irrelevant whether the suspected contraband was in plain view when the first DEA agent arrived and argue only that the plastic bags could not be opened and their contents tested

without a warrant. In short, they challenge only the expansion of the private search, place no reliance on the fact that the plastic bags containing the suspected contraband might not have been left in plain view by the private searchers, and do not contend that their Fourth Amendment rights were violated by the duplication of the private search they alleged in the District Court was necessitated by the condition to which the private searchers returned the package. In these circumstances, it would be the better course for the Court to decide the case on the basis of the facts found by the Magistrate and not rejected by the Court of Appeals, to consider only whether the alleged expansion of the private search by the field test violated the Fourth Amendment, and to leave for another day the question whether federal agents could have duplicated the prior private search had that search not left the contraband in plain view.

Second, if the Court feels that the Magistrate may have erred in concluding that the white powder was in plain view when the first agent arrived and believes that respondents have not abandoned their challenge to the agent's duplication of the prior private search, it nevertheless errs in responding to that challenge. The task of reviewing the Magistrate's findings belongs to the District Court and the Court of Appeals in the first instance. We should request that they perform that function, particularly since if the Magistrate's finding that the contraband was in plain view when the federal agent arrived were to be sustained, there would be no need to address the difficult constitutional question decided today. The better course, therefore, would be to remand the case after rejecting the Court of Appeals' decision invalidating the field test as an illegal expansion of the private search.

Third, if this case must be judged on the basis that the plastic bags and their contents were concealed when the first agent arrived, I disagree with the Court's conclusion that the agent could, without a warrant, uncover or unwrap the tube

and remove its contents simply because a private party had previously done so. The remainder of this opinion will address this issue.

The governing principles with respect to the constitutional protection afforded closed containers and packages may be readily discerned from our cases. The Court has consistently rejected proposed distinctions between worthy and unworthy containers and packages, *United States* v. *Ross*, 456 U. S. 798, 815, 822–823 (1982); *Robbins* v. *California*, 453 U. S. 420, 425–426 (1981) (plurality opinion), and has made clear that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view" and does not otherwise unmistakably reveal its contents. *United States* v. *Ross*, *supra*, at 822–823; see *Robbins* v. *California*, *supra*, at 427–428 (plurality opinion); *Arkansas* v. *Sanders*, 442 U. S. 753, 764, n. 13 (1979). Although law enforcement officers may sometimes seize such containers and packages pending issuance of warrants to examine their contents, *United States* v. *Place*, 462 U. S. 696, 701 (1983); *Texas* v. *Brown*, 460 U. S. 730, 749–750 (1983) (STEVENS, J., concurring in judgment), the mere existence of probable cause to believe that a container or package contains contraband plainly cannot justify a warrantless examination of its contents. *Ante*, at 114; *United States* v. *Ross*, *supra*, at 809–812; *Arkansas* v. *Sanders*, *supra*, at 762; *United States* v. *Chadwick*, 433 U. S. 1, 13, and n. 8 (1977).

This well-established prohibition of warrantless searches has applied notwithstanding the manner in which the police obtained probable cause. The Court now for the first time sanctions warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search. It declares, in fact, that governmental inspections following on the heels of private searches are not searches at all as long as the police do no more than the private parties have already done. In reaching this conclusion, the Court excessively expands our prior decisions rec-

ognizing that the Fourth Amendment proscribes only governmental action. *Burdeau* v. *McDowell*, 256 U. S. 465 (1921); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490 (1971).

As the Court observes, the Fourth Amendment "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Ante*, at 113 (quoting *Walter* v. *United States*, 447 U. S. 649, 662 (1980) (BLACKMUN, J., dissenting)). Where a private party has revealed to the police information he has obtained during a private search or exposed the results of his search to plain view, no Fourth Amendment interest is implicated because the police have done no more than fail to avert their eyes. *Coolidge* v. *New Hampshire*, *supra*, at 489.

The private-search doctrine thus has much in common with the plain-view doctrine, which is "grounded on the proposition that once police are lawfully in a position *to observe an item firsthand*, its owner's privacy interest in that item is lost . . . ." *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983) (emphasis added). It also shares many of the doctrinal underpinnings of cases establishing that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," *United States* v. *Miller*, 425 U. S. 435, 443 (1976), although the analogy is imperfect since the risks assumed by a person whose belongings are subjected to a private search are not comparable to those assumed by one who voluntarily chooses to reveal his secrets to a companion.

Undoubtedly, the fact that a private party has conducted a search "that might have been impermissible for a government agent cannot render otherwise reasonable official conduct unreasonable." *Ante*, at 114–115. But the fact that a repository of personal property previously was searched by a private party has never been used to legitimize *governmental conduct* that otherwise would be subject to challenge under

the Fourth Amendment. If government agents are unwilling or unable to rely on information or testimony provided by a private party concerning the results of a private search and that search has not left incriminating evidence in plain view, the agents may wish to duplicate the private search to observe firsthand what the private party has related to them or to examine and seize the suspected contraband the existence of which has been reported. The information provided by the private party clearly would give the agents probable cause to secure a warrant authorizing such actions. Nothing in our previous cases suggests, however, that the agents may proceed to conduct their own search of the same or lesser scope as the private search without first obtaining a warrant. *Walter* v. *United States*, *supra*, at 660–662 (WHITE, J., concurring in part and concurring in judgment).

Walter v. *United States*, on which the majority heavily relies in opining that "[t]he additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search," *ante*, at 115, does not require that conclusion. JUSTICE STEVENS' opinion in *Walter* does contain language suggesting that the government is free to do all of what was done earlier by the private searchers. But this language was unnecessary to the decision, as JUSTICE STEVENS himself recognized in leaving open the question whether "the Government would have been required to obtain a warrant had the private party been the first to view [the films]," 447 U. S., at 657, n. 9, and in emphasizing that "[e]ven though some circumstances—for example, *if the results of the private search are in plain view when materials are turned over to the Government*—may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search." *Id.*, at 657 (emphasis added). Nor does JUSTICE BLACKMUN's dissent in *Walter* necessarily support today's holding, for it emphasized that the opened con-

tainers turned over to the Government agents "clearly revealed the nature of their contents," *id.*, at 663; see *id.*, at 665, and the facts of this case, at least as viewed by the Court, do not support such a conclusion.

Today's decision also is not supported by the majority's reference to cases involving the transmission of previously private information to the police by a third party who has been made privy to that information. *Ante*, at 117–118. The police may, to be sure, use confidences revealed to them by a third party to establish probable cause or for other purposes, and the third party may testify about those confidences at trial without violating the Fourth Amendment. But we have never intimated until now that an individual who reveals that he stores contraband in a particular container or location to an acquaintance who later betrays his confidence has no expectation of privacy in that container or location and that the police may thus search it without a warrant.

That, I believe, is the effect of the Court's opinion. If a private party breaks into a locked suitcase, a locked car, or even a locked house, observes incriminating information, returns the object of his search to its prior locked condition, and then reports his findings to the police, the majority apparently would allow the police to duplicate the prior search on the ground that the private search vitiated the owner's expectation of privacy. As JUSTICE STEVENS has previously observed, this conclusion cannot rest on the proposition that the owner no longer has a subjective expectation of privacy since a person's expectation of privacy cannot be altered by subsequent events of which he was unaware. *Walter* v. *United States*, *supra*, at 659, n. 12.

The majority now ignores an individual's subjective expectations and suggests that "[t]he reasonableness of an official invasion of a citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Ante*, at 115. On that view, however, the reasonableness of a particular individual's remaining expectation of privacy should turn entirely on whether the private

search left incriminating evidence or contraband in plain view. Cf. *Walter* v. *United States*, *supra*, at 663, 665 (BLACKMUN, J., dissenting). If the evidence or contraband is not in plain view and not in a container that clearly announces its contents at the end of a private search, the government's subsequent examination of the previously searched object necessarily constitutes an independent, governmental search that infringes Fourth Amendment privacy interests. 447 U. S., at 662 (WHITE, J., concurring in part and concurring in judgment).

The majority opinion is particularly troubling when one considers its logical implications. I would be hard-pressed to distinguish this case, which involves a private search, from (1) one in which the private party's knowledge, later communicated to the government, that a particular container concealed contraband and nothing else arose from his presence at the time the container was sealed; (2) one in which the private party learned that a container concealed contraband and nothing else when it was previously opened in his presence; or (3) one in which the private party knew to a certainty that a container concealed contraband and nothing else as a result of conversations with its owner. In each of these cases, the approach adopted by the Court today would seem to suggest that the owner of the container has no legitimate expectation of privacy in its contents and that government agents opening that container without a warrant on the strength of information provided by the private party would not violate the Fourth Amendment.

Because I cannot accept the majority's novel extension of the private-search doctrine and its implications for the entire concept of legitimate expectations of privacy, I concur only in Part III of its opinion and in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

This case presents two questions: first whether law enforcement officers may conduct a warrantless search of the

contents of a container merely because a private party has previously examined the container's contents and informed the officers of its suspicious nature; and second, whether law enforcement officers may conduct a chemical field test of a substance once the officers have legitimately located the substance. Because I disagree with the Court's treatment of each of these issues, I respectfully dissent.

I

I agree entirely with JUSTICE WHITE that the Court has expanded the reach of the private-search doctrine far beyond its logical bounds. *Ante*, at 127–133 (WHITE, J., concurring in judgment). It is difficult to understand how respondents can be said to have no expectation of privacy in a closed container simply because a private party has previously opened the container and viewed its contents. I also agree with JUSTICE WHITE, however, that if the private party presents the contents of a container to a law enforcement officer in such a manner that the contents are plainly visible, the officer's visual inspection of the contents does not constitute a "search" within the meaning of the Fourth Amendment. Because the record in this case is unclear on the question whether the contents of respondents' package were plainly visible when the Federal Express employee showed the package to the DEA officer, I would remand the case for further factfinding on this central issue.

II

As noted, I am not persuaded that the DEA officer actually came upon respondents' cocaine without violating the Fourth Amendment and, accordingly, I need not address the legality of the chemical field test. Since the Court has done so, however, I too will address the question, assuming, *arguendo*, that the officer committed neither an unconstitutional search nor an unconstitutional seizure prior to the point at which he took the sample of cocaine out of the plastic bags to conduct the test.

A

I agree that, under the hypothesized circumstances, the field test in this case was not a search within the meaning of the Fourth Amendment for the following reasons: *First*, the officer came upon the white powder innocently; *second*, under the hypothesized circumstances, respondents could not have had a reasonable expectation of privacy in the chemical identity of the powder because the DEA agents were already able to identify it as contraband with virtual certainty, *Texas* v. *Brown*, 460 U. S. 730, 750–751 (1983) (STEVENS, J., concurring in judgment); and *third*, the test required the destruction of only a minute quantity of the powder. The Court, however, has reached this conclusion on a much broader ground, relying on two factors alone to support the proposition that the field test was not a search: *First*, the fact that the test revealed only whether or not the substance was cocaine, without providing any further information; and *second*, the assumption that an individual does not have a reasonable expectation of privacy in such a fact.

The Court asserts that its "conclusion is dictated by *United States* v. *Place*," *ante*, at 123, in which the Court stated that a "canine sniff" of a piece of luggage did not constitute a search because it "is much less intrusive than a typical search," and because it "discloses only the presence or absence of narcotics, a contraband item." 462 U. S. 696, 707 (1983). Presumably, the premise of *Place* was that an individual could not have a reasonable expectation of privacy in the presence or absence of narcotics in his luggage. The validity of the canine sniff in that case, however, was neither briefed by the parties nor addressed by the courts below. Indeed, since the Court ultimately held that the defendant's luggage had been impermissibly seized, its discussion of the question was wholly unnecessary to its judgment. In short, as JUSTICE BLACKMUN pointed out at the time, "[t]he Court [was] certainly in no position to consider all the ramifications of this important issue." *Id.*, at 723–724.

Nonetheless, the Court concluded:

> "[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.*, at 707.

As it turns out, neither the Court's knowledge nor its imagination regarding criminal investigative techniques proved very sophisticated, for within one year we have learned of another investigative procedure that shares with the dog sniff the same defining characteristics that led the Court to suggest that the dog sniff was not a search.

Before continuing along the course that the Court so hastily charted in *Place*, it is only prudent to take this opportunity—in my view, the first real opportunity—to consider the implications of the Court's new Fourth Amendment jurisprudence. Indeed, in light of what these two cases have taught us about contemporary law enforcement methods, it is particularly important that we analyze the basis upon which the Court has redefined the term "search" to exclude a broad class of surveillance techniques. In my view, such an analysis demonstrates that, although the Court's conclusion is correct in this case, its dictum in *Place* was dangerously incorrect. More important, however, the Court's reasoning in both cases is fundamentally misguided and could potentially lead to the development of a doctrine wholly at odds with the principles embodied in the Fourth Amendment.

Because the requirements of the Fourth Amendment apply only to "searches" and "seizures," an investigative technique

that falls within neither category need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use. The prohibitions of the Fourth Amendment are not, however, limited to any preconceived conceptions of what constitutes a search or a seizure; instead we must apply the constitutional language to modern developments according to the fundamental principles that the Fourth Amendment embodies. *Katz* v. *United States*, 389 U. S. 347 (1967). See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 356 (1974). Before excluding a class of surveillance techniques from the reach of the Fourth Amendment, therefore, we must be certain that none of the techniques so excluded threatens the areas of personal security and privacy that the Amendment is intended to protect.

What is most startling about the Court's interpretation of the term "search," both in this case and in *Place*, is its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique, rather than on the context in which the information or item is concealed. Combining this approach with the blanket assumption, implicit in *Place* and explicit in this case, that individuals in our society have no reasonable expectation of privacy in the fact that they have contraband in their possession, the Court adopts a general rule that a surveillance technique does not constitute a search if it reveals only whether or not an individual possesses contraband.

It is certainly true that a surveillance technique that identifies only the presence or absence of contraband is less intrusive than a technique that reveals the precise nature of an item regardless of whether it is contraband. But by seizing upon this distinction alone to conclude that the first type of technique, as a general matter, is not a search, the Court has foreclosed any consideration of the circumstances under which the technique is used, and may very well have paved

the way for technology to override the limits of law in the area of criminal investigation.

For example, under the Court's analysis in these cases, law enforcement officers could release a trained cocaine-sensitive dog—to paraphrase the California Court of Appeal, a "canine cocaine connoisseur"—to roam the streets at random, alerting the officers to people carrying cocaine. Cf. *People* v. *Evans*, 65 Cal. App. 3d 924, 932, 134 Cal. Rptr. 436, 440 (1977). Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court's approach, to the police setting up such a device on a street corner and scanning all passersby. In fact, the Court's analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. In short, under the interpretation of the Fourth Amendment first suggested in *Place* and first applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even "reasonable suspicion" may very well become notions of the past. Fortunately, we know from precedents such as *Katz* v. *United States*, *supra*, overruling the "trespass" doctrine of *Goldman* v. *United States*, 316 U. S. 129 (1942), and *Olmstead* v. *United States*, 277 U. S. 438 (1928), that this Court ultimately stands ready to prevent this Orwellian world from coming to pass.

Although the Court accepts, as it must, the fundamental proposition that an investigative technique is a search within the meaning of the Fourth Amendment if it intrudes upon a privacy expectation that society considers to be reasonable,

ante, at 113, the Court has entirely omitted from its discussion the considerations that have always guided our decisions in this area. In determining whether a reasonable expectation of privacy has been violated, we have always looked to the context in which an item is concealed, not to the identity of the concealed item. Thus in cases involving searches for physical items, the Court has framed its analysis first in terms of the expectation of privacy that normally attends the location of the item and ultimately in terms of the legitimacy of that expectation. In *United States* v. *Chadwick*, 433 U. S. 1 (1977), for example, we held that "[n]o less than one who locks the doors of his home against intruders, one who safeguards his possessions [by locking them in a footlocker] is due the protection of the Fourth Amendment . . . ." *Id.*, at 11. Our holding was based largely on the observation that, "[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination." *Ibid.* The Court made the same point in *United States* v. *Ross*, 456 U. S. 798, 822–823 (1982), where it held that the "Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." The fact that a container contains contraband, which indeed it usually does in such cases, has never altered our analysis.

Similarly, in *Katz* v. *United States*, we held that electronic eavesdropping constituted a search under the Fourth Amendment because it violated a reasonable expectation of privacy. In reaching that conclusion, we focused upon the private context in which the conversation in question took place, stating: "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U. S., at 351–352. Again, the fact that the conversations involved in *Katz* were incriminating did not alter our consideration of the

privacy issue. Nor did such a consideration affect our analysis in *Payton* v. *New York*, 445 U. S. 573 (1980), in which we reaffirmed the principle that the home is private even though it may be used to harbor a fugitive.

In sum, until today this Court has always looked to the manner in which an individual has attempted to preserve the private nature of a particular fact before determining whether there is a reasonable expectation of privacy upon which the government may not intrude without substantial justification. And it has always upheld the general conclusion that searches constitute at least "those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties." *United States* v. *White*, 401 U. S. 745, 786 (1971) (Harlan, J., dissenting).

Nonetheless, adopting the suggestion in *Place*, the Court has veered away from this sound and well-settled approach and has focused instead solely on the product of the would-be search. In so doing, the Court has ignored the fundamental principle that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars* v. *United States*, 273 U. S. 28, 29 (1927). The unfortunate product of this departure from precedent is an undifferentiated rule allowing law enforcement officers free rein in utilizing a potentially broad range of surveillance techniques that reveal only whether or not contraband is present in a particular location. The Court's new rule has rendered irrelevant the circumstances surrounding the use of the technique, the accuracy of the technique, and the privacy interest upon which it intrudes. Furthermore, the Court's rule leaves no room to consider whether the surveillance technique is employed randomly or selectively, a consideration that surely implicates Fourth Amendment concerns. See 2 W. LaFave, Search and Seizure § 2.2(f) (1978). Although a technique that reveals only the presence or absence of illegal

activity intrudes less into the private life of an individual under investigation than more conventional techniques, the fact remains that such a technique does intrude. In my view, when the investigation intrudes upon a domain over which the individual has a reasonable expectation of privacy, such as his home or a private container, it is plainly a search within the meaning of the Fourth Amendment. Surely it cannot be that the individual's reasonable expectation of privacy dissipates simply because a sophisticated surveillance technique is employed.

This is not to say that the limited nature of the intrusion has no bearing on the general Fourth Amendment inquiry. Although there are very few exceptions to the general rule that warrantless searches are presumptively unreasonable, the isolated exceptions that do exist are based on a "balancing [of] the need to search against the invasion which the search entails." *Camara* v. *Municipal Court*, 387 U. S. 523, 537 (1967). Hence it may be, for example, that the limited intrusion effected by a given surveillance technique renders the employment of the technique, under particular circumstances, a "reasonable" search under the Fourth Amendment. See *United States* v. *Place*, 462 U. S., at 723 (BLACKMUN, J., concurring in judgment) ("a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry*"). At least under this well-settled approach, the Fourth Amendment inquiry would be broad enough to allow consideration of the method by which a surveillance technique is employed as well as the circumstances attending its use. More important, however, it is only under this approach that law enforcement procedures, like those involved in this case and in *Place*, may continue to be governed by the safeguards of the Fourth Amendment.

B

In sum, the question whether the employment of a particular surveillance technique constitutes a search depends on

whether the technique intrudes upon a reasonable expectation of privacy. This inquiry, in turn, depends primarily on the private nature of the area or item subjected to the intrusion. In cases involving techniques used to locate or identify a physical item, the manner in which a person has attempted to shield the item's existence or identity from public scrutiny will usually be the key to determining whether a reasonable expectation of privacy has been violated. Accordingly, the use of techniques like the dog sniff at issue in *Place* constitutes a search whenever the police employ such techniques to secure any information about an item that is concealed in a container that we are prepared to view as supporting a reasonable expectation of privacy. The same would be true if a more technologically sophisticated method were developed to take the place of the dog.

In this case, the chemical field test was used to determine whether certain white powder was cocaine. Upon visual inspection of the powder in isolation, one could not identify it as cocaine. In the abstract, therefore, it is possible that an individual could keep the powder in such a way as to preserve a reasonable expectation of privacy in its identity. For instance, it might be kept in a transparent pharmaceutical vial and disguised as legitimate medicine. Under those circumstances, the use of a chemical field test would constitute a search. However, in this case, as hypothesized above, see *supra*, at 134, the context in which the powder was found could not support a reasonable expectation of privacy. In particular, the substance was found in four plastic bags, which had been inside a tube wrapped with tape and sent to respondents via Federal Express. It was essentially inconceivable that a legal substance would be packaged in this manner for transport by a common carrier. Thus, viewing the powder as they did at the offices of Federal Express, the DEA agent could identify it with "virtual certainty"; it was essentially as though the chemical identity of the powder was

plainly visible. See *Texas* v. *Brown*, 460 U. S., at 751 (STEVENS, J., concurring in judgment). Under these circumstances, therefore, respondents had no reasonable expectation of privacy in the identity of the powder, and the use of the chemical field test did not constitute a "search" violative of the Fourth Amendment.

ARIZONA *v.* CALIFORNIA ET AL.

ON BILL OF COMPLAINT

No. 8, Orig. Decided June 3, 1963—Decree entered March 9, 1964—Amended decree entered February 28, 1966—Decided and supplemental decree entered January 9, 1979—Decided March 30, 1983—Second supplemental decree entered April 16, 1984

Second supplemental decree entered.

Opinion reported: 373 U. S. 546; decree reported: 376 U. S. 340; amended decree reported: 383 U. S. 268; opinion and supplemental decree reported: 439 U. S. 419; opinion reported: 460 U. S. 605.

SECOND SUPPLEMENTAL DECREE.

The Court having, on March 30, 1983, rendered its decision on the several Exceptions to the Final Report of the Special Master herein, approving the recommendation that the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Indian Tribe, and the Cocopah Indian Tribe be permitted to intervene, approving some of his further recommendations and disapproving others, all as specified in this Court's opinion, 460 U. S. 605 (1983), the following supplemental decree is now entered to implement the decision of March 30, 1983.

IT IS ORDERED, ADJUDGED, AND DECREED:

A. Paragraphs (2) and (5) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U. S. 340, 344–345), are hereby amended to read as follows:

> (2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 9,707 acre-feet of diversions from the mainstream or (ii) the quantity of water necessary to supply the consumptive use required for irrigation of 1,524 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 27, 1917, for lands reserved by the Executive Order of said date; June 24, 1974, for lands reserved by the Act of June 24, 1974 (88 Stat. 266, 269);

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 129,767 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,076 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided that the quantities fixed in this paragraph, and in paragraphs 1, 2, 3, and 4 shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

B. Paragraph I(A) of the Decree of January 9, 1979 (439 U. S. 419, 423) is hereby amended to read as follows:

I

ARIZONA

A. Federal Establishments' Present Perfected Rights

The federal establishments named in Art. II, subdivision (D), paragraphs (2), (4), and (5) of the Decree entered March 9, 1964, in this case:

Defined Area of Land	*Annual Diversions (Acre-Feet)**	*Net Acres**	*Priority Date*
1) Cocopah Indian Reservation	7,681	1,206	Sept. 27, 1917
2) Colorado River Indian	358,400	53,768	Mar. 3, 1865
Reservation	252,016	37,808	Nov. 22, 1873
	51,986	7,799	Nov. 16, 1874
3) Fort Mojave Indian Reservation	27,969	4,327	Sept. 18, 1890
	75,566	11,691	Feb. 2, 1911

*The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

C. In addition to the mainstream diversion rights in favor of the Indian Reservations specified in Paragraph I(A) of the Decree of January 9, 1979, as amended by Paragraph B of this decree, a mainstream diversion right of 2,026 acre-feet for the Cocopah Reservation shall be charged against the State of Arizona with a priority date of June 24, 1974.

D. Except as otherwise provided herein, the Decree entered on March 9, 1964, and the Supplemental Decree entered on January 9, 1979, shall remain in full force and effect.

E. The allocation of costs previously made by the Special Master is approved and no further costs shall be taxed in this Court, absent further proceedings after entry of this Decree.

F. The Special Master appointed by the Court is discharged with the thanks of the Court.

G. The Court shall retain jurisdiction herein to order such further proceedings and enter such supplemental decree as may be deemed appropriate.

JUSTICE MARSHALL took no part in the consideration or decision of this matter.

Syllabus

BALDWIN COUNTY WELCOME CENTER *v.* BROWN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83–181. Decided April 16, 1984

After respondent filed a complaint with the Equal Employment Opportunity Commission alleging discriminatory treatment by her former employer (petitioner), she received a right-to-sue letter from the Commission in January 1981, informing her that she could commence a civil action in Federal District Court and that, if she chose to do so, the suit must be filed within 90 days of receipt of the letter. Respondent mailed the letter to the District Court, where it was received in March. In addition, she requested appointment of counsel. In April, a Magistrate entered an order requiring that respondent's request for appointment of counsel be made by use of the court's motion form and supporting questionnaire, and reminding her that a complaint must be filed within 90 days of the issuance of the right-to-sue letter. The questionnaire was not returned until the 96th day after receipt of the right-to-sue letter, and on the next day the Magistrate denied, as untimely, the motion for appointment of counsel but referred to the District Judge the question whether the filing of the right-to-sue letter with the court constituted commencement of an action under the Federal Rules of Civil Procedure. The court held that respondent forfeited her right to pursue her claim under Title VII of the Civil Rights Act of 1964 because of her failure to file a proper complaint within 90 days of receipt of the right-to-sue letter, as required by the Act. The Court of Appeals reversed.

Held: There is no basis for giving Title VII actions a special status under the Federal Rules of Civil Procedure, as the Court of Appeals apparently did. Rule 3 states that an action "is commenced by filing a complaint with the court," and Rule 8(a)(2) provides that a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court of Appeals suggested no persuasive justification for its view that the Federal Rules were to have a different meaning in, or were not to apply to, Title VII litigation. Nor is there any basis for the Court of Appeals' apparent alternative holding that the statutory 90-day period for invoking the court's jurisdiction is "tolled" by the filing of the right-to-sue letter. The record does not support application of the doctrine of equitable tolling.

Certiorari granted; 698 F. 2d 1236, reversed.

PER CURIAM.

On November 6, 1979, respondent Celinda Brown filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging discriminatory treatment by her former employer, petitioner Baldwin County Welcome Center (Welcome Center). A notice of right to sue was issued to her on January 27, 1981. It stated that if Brown chose to commence a civil action "such suit must be filed in the appropriate United States District Court within ninety days of [her] receipt of this Notice."[1] Later, Brown mailed the notice to the United States District Court, where it was received on March 17, 1981.[2] In addition, she requested appointment of counsel.

On April 15, 1981, a United States Magistrate entered an order requiring that Brown make application for court-appointed counsel using the District Court's motion form and supporting questionnaire. The Magistrate's order to Brown reminded her of the necessity of filing a complaint within 90 days of the issuance of the right-to-sue letter. The questionnaire was not returned until May 6, 1981, the 96th day after receipt of the letter. The next day, the Magistrate denied Brown's motion for appointment of counsel because she had not timely complied with his orders, but he referred to the District Judge the question whether the filing of the right-to-sue letter with the court constituted commencement of an action within the meaning of Rule 3 of the Federal Rules of Civil Procedure. On June 9, 1981, the 130th day after receipt of the right-to-sue letter, Brown filed an "amended complaint," which was served on June 18.

On December 24, 1981, the District Court held that Brown had forfeited her right to pursue her claim under Title VII of

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[1] The presumed date of receipt of the notice was January 30, 1981. Fed. Rule Civ. Proc. 6(e).

[2] Brown mailed the letter to the United States District Court for the Middle District of Alabama. The case was transferred to the Southern District of Alabama, however, because the events giving rise to the charge had occurred there.

the Civil Rights Act of 1964 because of her failure to file a complaint meeting the requirements of Rule 8 of the Federal Rules of Civil Procedure within 90 days of her receipt of the right-to-sue letter. It noted that the right-to-sue letter did not qualify as a complaint under Rule 8 because there was no statement in the letter of the factual basis for the claim of discrimination, which is required by the Rule.

The Court of Appeals for the Eleventh Circuit reversed, holding that the filing of a right-to-sue letter "tolls" the time period provided by Title VII. Judgment order reported at 698 F. 2d 1236 (1983). Although conceding that its interpretation was "generous," the court stated that "[t]he remedial nature of the statute requires such an interpretation." The court then stated that the filing of the right-to-sue letter "satisfied the ninety day statutory limitation."

The Welcome Center petitioned for a writ of certiorari from this Court. We grant the petition and reverse the judgment of the Court of Appeals.

The section of Title VII at issue here states that within 90 days after the issuance of a right-to-sue letter "a civil action may be brought against the respondent named in the charge." 86 Stat. 106, 42 U. S. C. § 2000e–5(f)(1). Rule 3 of the Federal Rules of Civil Procedure states that "[a] civil action is commenced by filing a complaint with the court." A complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). The District Court held that the right-to-sue letter did not satisfy that standard. The Court of Appeals did not expressly disagree, but nevertheless stated that the 90-day statutory period for invoking the court's jurisdiction was satisfied, apparently concluding that the policies behind Title VII mandate a different definition of when an action is "commenced."[3] However, it identi-

[3] Neither the parties nor the courts below addressed the application of Rule 15(c) to the "amended complaint" filed on June 9. That Rule provides that amendment of a pleading "relates back" to the date of the original

fied no basis in the statute or its legislative history, cited no decision of this Court, and suggested no persuasive justification for its view that the Federal Rules of Civil Procedure were to have a different meaning in, or were not to apply to, Title VII litigation. Because we also can find no satisfactory basis for giving Title VII actions a special status under the Rules of Civil Procedure, we must disagree with the conclusion of the Court of Appeals.[4]

With respect to its apparent alternative holding that the statutory period for invoking the court's jurisdiction is "tolled" by the filing of the right-to-sue letter, the Court of

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pleading. We do not believe that Rule 15(c) is applicable to this situation. The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide. 3 J. Moore, Moore's Federal Practice ¶ 15.15[3], p. 15–194 (1984). Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). Because the initial "pleading" did not contain such notice, it was not an original pleading that could be rehabilitated by invoking Rule 15(c).

[4]JUSTICE STEVENS makes much of a letter dated March 21, 1981, sent by Brown to the District Court in which she describes the basis of her claim. Suffice it to say that no one but the dissent has relied upon this letter to sustain Brown's position. There is nothing in the record to suggest that the letter was considered by the District Court or the Court of Appeals, and Brown does not rely upon it before this Court as a basis for affirming the judgment. The issue before the Court of Appeals and before this Court is whether the filing of a right-to-sue letter with the District Court constituted the commencement of an action. The Court of Appeals held that it did and based its judgment on that ground. We reverse that judgment. Even if respondent had relied on the letter in this Court, we would not be required to assess its significance without having the views of the lower courts in the first instance.

JUSTICE STEVENS also suggests that we should be more solicitous of the pleadings of the *pro se* litigant. It is noteworthy, however, that Brown was represented by counsel at the time of the dismissal by the District Court, before the Court of Appeals, and before this Court. Neither Brown nor her counsel ever requested that the letter in the record be construed as a complaint.

Appeals cited no principle of equity to support its conclusion.[5] Brown does little better, relying only on her asserted "diligent efforts." Nor do we find anything in the record to call for the application of the doctrine of equitable tolling.

The right-to-sue letter itself stated that Brown had the right to sue within 90 days. Also, the District Court informed Brown that "to be safe, you should file the petition on or before the ninetieth day after the day of the letter from the EEOC informing you of your right to sue." Finally, the order of April 15 from the Magistrate again reminded Brown of the 90-day limitation.

This is not a case in which a claimant has received inadequate notice, see *Gates* v. *Georgia-Pacific Corp.*, 492 F. 2d 292 (CA9 1974); or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, see *Harris* v. *Walgreen's Distribution Center*, 456 F. 2d 588 (CA6 1972); or where the court has led the plaintiff to believe that she had done everything required of her, see *Carlile* v. *South Routt School District RE 3–J*, 652 F. 2d 981 (CA10 1981). Nor is this a case where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. See *Villasenor* v. *Lockheed Aircraft Corp.*, 640 F. 2d 207 (CA9 1981); *Wilkerson* v. *Siegfried Insurance Agency, Inc.*, 621 F. 2d 1042 (CA10 1980); *Leake* v. *University of Cincinnati*, 605 F. 2d 255 (CA6 1979). The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.

Brown also contends that the doctrine of equitable tolling should apply because the Welcome Center has not demonstrated that it was prejudiced by her failure to comply with

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[5] It is not clear from the opinion of the Court of Appeals for how long the statute is tolled. Presumably, under its view, the plaintiff has a "reasonable time" in which to file a complaint that satisfies the requirements of Rule 8. See *Huston* v. *General Motors Corp.*, 477 F. 2d 1003 (CA8 1973). In this case, it was another 84 days until such a complaint was filed.

the Rules.[6] This argument is unavailing. Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.

Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

The petition for certiorari is granted, respondent's motion to proceed *in forma pauperis* is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Whenever this Court acts summarily, there is an increased risk that it will make a mistake. Without the benefit of full briefs and oral argument, an important issue may escape our attention. The case the Court decides today involves possible violations of two time limitations imposed by Congress. The first—a jurisdictional limitation—simply escapes the at-

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[6] Brown also contends that application of the doctrine of equitable tolling is mandated by our decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982). In *Zipes*, we held that the requirement of a timely filing of a charge of discrimination with the EEOC under 42 U. S. C. § 2000e–5(e) is not a jurisdictional prerequisite to a suit in district court and that it is subject to waiver and equitable tolling. Brown's argument is without merit, for we did not in *Zipes* declare that the requirement need not ever be satisfied; we merely stated that it was subject to waiver and tolling. There was neither waiver nor tolling in this case.

tention of the Court; the second, which is subject to tolling, is misapplied by the Court because its review of the record is so cursory.

Like the Court, I am firmly convinced that "'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law,'" *ante*, at 152 (quoting *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980)). The Court does not, however, follow that teaching in this case. A rather full statement is necessary to explain the extent of the Court's departure from the controlling procedural requirements.

I

In 1979, respondent charged that her former employer had discriminated against her on account of her race in a complaint filed with the Equal Employment Opportunity Commission (EEOC). The EEOC ultimately sent respondent a right-to-sue letter, dated January 27, 1981. The letter stated that more than 180 days had elapsed since the Commission assumed jurisdiction, that the Commission had not filed a suit, and that respondent had specifically requested the notice of the right to sue regarding her "Charge Against Baldwin County Welcome Center No. 042800149." 1 Record 1. It also stated in part:

> "If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice. If you are unable to retain an attorney, the Court is authorized *in its discretion* to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you should, *well before the expiration of the above 90-day period*, take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States

District Court in Montgomery." *Ibid.* (emphasis in original).

On March 16, respondent called the Clerk's office in the District Court in Montgomery, Alabama. Pursuant to that conversation, she immediately sent her notice, along with correspondence, to the court with a request for appointed counsel. *Id.*, at 1–3, 5. On March 18, a Deputy Clerk sent a letter to respondent, telling her that if "you wish to proceed with this matter" sign and have notarized the enclosed *in forma pauperis (ifp)* affidavit and motion for appointment of counsel and return the forms "immediately as time is a factor in filing this matter." *Id.*, at 4. The letter noted that respondent should include any other documents she had concerning the matter. On March 21, respondent returned the *ifp* affidavit and had typed onto the affidavit a request for a court-appointed attorney. *Id.*, at 13. She also sent a letter, marked to the attention of "Counselor or Attorney & District Clerk" in which she made a short and plain statement of her claim. *Id.*, at 10–12. Though a portion of the relevant language—perhaps significant language—is missing from the copy of the letter contained in the record, the letter alleged that the Baldwin County Welcome Center had caused her to be fired, described the harm it had caused her, alleged (after the missing language) ". . . worked on this job. None of the other workers were subjected to this type of hardship and inconveniences," and described "another example of how I was ill treated." *Id.*, at 11. At the end of her letter, she stated that her appointed attorney should note that "I am asking or seeking monetary damages, as well as hardship damages, damages done to my credit ratings, . . . as the well as the damages done to my character, and intellect, and whatever he may see to be justice in my behalf. Thank You!" *Id.*, at 12. The *ifp* affidavit and the letter were received by the District Court on March 24, and apparently docketed on March 30. Judge Varner granted respondent leave to proceed *in forma pauperis* on March 30. *Id.*, at 13.

On April 6, Judge Varner *sua sponte* transferred the case to the Southern District of Alabama because it was obvious to him that the Southern District was more convenient for all parties. *Id.*, at 15. He transferred the case, captioned *Brown* v. *Baldwin County Welcome Center*, Misc. No. 1324, pursuant to 28 U. S. C. § 1404(a), which permits a district court to transfer any "civil action" to any other district where it might have been brought. The following day, Judge Varner sent respondent a letter, explaining that the "case" had been transferred, and further stating that under "the law" she had 90 days after the date of the EEOC letter to file a "petition" in the transferee court. 1 Record 16. He noted that on "some occasions" the letter she had written requesting appointment of counsel could be considered as "your petition for relief . . . within the 90-day time," but stated "to be safe, you should file the petition" within the 90-day period. *Ibid.* He also noted that he was calling the transferee court's "attention to the fact that you have asked that the court appoint you an attorney." *Ibid.* Judge Varner also sent a letter to the Clerk of the Southern District explaining the situation. Though relevant language is again missing from the copy of this letter in the record, the letter states that respondent had been granted leave to proceed *in forma pauperis* and that she had requested the appointment of counsel. *Id.*, at 15.

The case, now *Brown* v. *Baldwin County Welcome Center*, Civil Action No. 81–0241–H, was referred to a Magistrate, who on April 15 *sua sponte* issued an "order" requiring "plaintiff" to "appear in the Clerk's office as soon as practicable" to complete a questionnaire regarding appointment of counsel, and stating: "Plaintiff is reminded that a complaint must be filed within ninety (90) days after the date of the Notice of Right to Sue, and that time is of the essence." 1 Record 17. The order also stated that the questionnaire would have to be completed "well in advance" of that time, "because a lawsuit cannot necessarily be drafted in a short

time by a lawyer who has no advance notice of the case." *Ibid.* Thus, the order continued, if the questionnaire were not completed "in time for a reasoned decision to be made on time," the motion could be denied, and the order indicated that the motion could be denied in any event, and hence "plaintiff would be well advised to approach the Legal Services Corporation and any other legal aid office on her own to see if she can obtain representation." *Id.*, at 18. On May 2, respondent filled out another *ifp* affidavit, signed a motion for appointment of counsel, and completed an accompanying information sheet, which were all file stamped May 6. *Id.*, at 19–23. On the information sheet, she explained she had contacted a legal aid office in Tennessee, which had referred her to two Florida offices, "and their response was they were filled up with cases." *Id.*, at 23.

In an order entered on May 7, the Magistrate denied the motion for appointment of counsel. The Magistrate observed at the outset that under applicable Fifth Circuit cases, he should consider

> "'the merits of the plaintiff's claim, the plaintiff's efforts to obtain counsel, and the plaintiff's financial ability to retain counsel.'
>
> "In doing so Courts are required to 'be sensitive to the problems faced by *pro se* litigants and innovative in their responses to them.'
>
> "From this array of factors, it is necessary to consider only one: 'the plaintiff's efforts to obtain counsel,' namely, failure timely to comply with the order dated April 15, 1981." *Id.*, at 25–26 (footnotes citing cases omitted).

After this innovative display of sensitivity to the problems encountered by *pro se* litigants, the Magistrate stated that the 90-day limitation period was jurisdictional, citing *Prophet* v. *Armco Steel, Inc.*, 575 F. 2d 579 (CA5 1978), and then turned to the "next question . . . whether plaintiff's motion should be denied for untimely compliance with the

order dated April 15, 1981." In analyzing that question, he sketched the procedural history of the case, noting that it had been transferred under 28 U. S. C. § 1404(a), and opined: "To say the least it is not clear whether this is now a 'case' or not." 1 Record 28 (footnote omitted). The Magistrate then observed that notwithstanding the April 15 order, plaintiff did not file the motion for appointment of counsel for three weeks—almost a week after the 90th day. He concluded:

> "If the filing of the right-to-sue letter is 'filing of a complaint with the court' within the meaning of Rule 3 of the Federal Rules of Civil Procedure, this is a case in which the 'complaint' can be amended. If it is not, of course, this file is not a lawsuit. That question is one for the district judge.
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> "In either event, the motion for appointment of counsel is DENIED for failure timely to comply with the order dated April 15, 1981." *Id.*, at 29.

On June 9, an attorney filed a notice of appearance on behalf of respondent, along with another *ifp* affidavit, and an "amended complaint." *Ifp* status was again granted, by Judge Hand, on June 15. The amended complaint itself contained fewer facts than the respondent's March 21 letter, but did contain many legal conclusions, assertions, and citations, asserting claims under 42 U. S. C. § 2000e and 42 U. S. C. § 1981, among other statutes and constitutional provisions. It was also, of course, denominated a complaint. Hence, on June 16, a summons was finally issued, and was served on petitioner on June 18. 1 Record 39–40. The State of Alabama Bureau of Publicity and Information, the agency which operated the Baldwin County Welcome Center, filed an answer on July 8, "reserv[ing] the right to present a Statute of Limitations bar to this suit if discovery should reveal that the suit was not brought within 90 days of the issuance of the EEOC 'right to [s]ue' letter." *Id.*, at 42. Discovery commenced, and a trial was scheduled for the week of January 18, 1982. *Id.*, at 46–47.

On December 24, apparently *sua sponte*, though apparently after obtaining briefing by the parties, see *id.*, at 72, Judge Hand entered an order stating at the outset:

> "The issue before the Court is whether a pro se plaintiff can commence an employment-discrimination suit under 42 U. S. C., §2000e by merely filing a copy of a right-to-sue letter issued by the United States Department of Justice. For the reasons below, the Court holds that in this case the simple filing of the right-to-sue letter was inadequate to commence a civil action under 42 U. S. C., §200[0]e–5(f)(1)." *Id.*, at 67.

The court found it "especially significant that the right-to-sue letter . . . wholly fails to indicate the factual basis upon which the alleged claim of discrimination was based," and stated that the "sole function served by the notice issued in this case is to notify the plaintiff that if she chooses to commence a civil action 'such suit must be filed in the appropriate United [S]tates District Court within ninety days of [her] receipt of this Notice.'" *Ibid.* The court found the notice to be "crystal clear" in indicating "a further step" would be required "to file a civil action," and stated that the "plain language of 42 U. S. C. §2000e–5(f)(1) and Fed. R. Civ. P. 3 demonstrate that a right-to-sue letter is not equivalent to a complaint." *Id.*, at 68.

The court considered itself confronted with conflicting authority on the issue before it: *Wrenn* v. *American Cast Iron Pipe Co.*, 575 F. 2d 544 (CA5 1978) (holding that presenting right-to-sue letter and requesting appointment of counsel satisfies 90-day limitation period) (opinion by Roney, J.); *Prophet* v. *Armco Steel, Inc.*, *supra (per curiam)* (stating that the statute requires a "complaint" to be filed within 90 days); and *Nilsen* v. *City of Moss Point*, 621 F. 2d 117 (CA5 1980) (stating that the statute requires that civil actions be "commenced" within 90 days) (opinion by Roney, J). Although the latter cases did not suggest that

the respective plaintiffs had presented their right-to-sue letters and requested appointment of counsel within the 90-day time period, the District Court viewed the latter cases as representing the "better view" in requiring that a complaint be filed within the time period. 1 Record 68 The court concluded that "[a]t the very minimum, the accusatory instrument should contain a short and plain statement of the factual basis upon which the claim rests," and that "the plaintiff has forfeited her right to pursue her Title VII claim because of her failure to file a complaint which meets the requirements of Rule 8 of the Federal Rules of Civil Procedure within ninety days after receiving her right-to-sue letter . . . ." *Ibid.* The court noted, however, that the amended complaint contained claims which were not time-barred, and observed that the case could be pretried on January 13, 1982, as originally scheduled.

On January 5, 1982, pursuant to a motion filed by respondent's counsel, the court amended its December 24 order, see Fed. Rule App. Proc. 5(a), to include a statement permitting an interlocutory appeal pursuant to 28 U. S. C. § 1292(b), stating that the controlling question of law was "whether the filing of an EEOC right-to-sue letter with the Court of appropriate jurisdiction tolls the 90-day limitation provided for in 42 U. S. C. § 2000e–5(f)(1)." 1 Record 70. The court also stayed all proceedings in the case until the Court of Appeals acted. *Id.*, at 71. On January 13, respondent filed a notice of appeal and a statement of issues on appeal in the District Court. *Id.*, at 76, 77. The issue on appeal was framed as follows: "Whether under the facts of this case plaintiff's filing of an EEOC right-to-sue letter with a court of appropriate jurisdiction tolls the 90-day limitation period provided for in 42 U. S. C. § 2000e–5(f)(1)." *Id.*, at 77.

Then, nothing happened. Nothing happened because respondent had not filed a petition in the Court of Appeals within the 10-day period required by 28 U. S. C. § 1292(b) and Federal Rule of Appellate Procedure 5(a). On Septem-

ber 29, 1982—nine months after the interlocutory appeal was certified—respondent moved the District Court "to supplement" its previous order of December 24, as amended on January 5, to permit filing the interlocutory appeal which was time-barred. Petitioner opposed the motion, citing *Alabama Labor Council* v. *Alabama*, 453 F. 2d 922 (CA5 1972), Fed. Rule App. Proc. 26(b), Fed. Rules Civ. Proc. 6 and 60(b), as precluding an enlargement of the time for filing the interlocutory appeal.

The District Court reentered its previous order on October 5, citing *Aparicio* v. *Swan Lake*, 643 F. 2d 1109 (CA5 1981) as authority for permitting a new interlocutory appeal. 1 Record 86. Respondent filed a petition in the Court of Appeals on October 8, and the United States Court of Appeals for the Eleventh Circuit, viewing the Fifth Circuit's decision in *Aparicio* as binding authority under its decision in *Bonner* v. *City of Prichard*, 661 F. 2d 1206 (CA11 1981) (en banc), granted permission for the interlocutory appeal. 2 Record, Doc. No. 2. The appeal was submitted on the briefs without oral argument on January 27, 1983, and four days later the Court of Appeals reversed in a four-page unpublished opinion on the basis of the Fifth Circuit's decision in *Wrenn*. Judgment order reported at 698 F. 2d 1236 (1983). Petitioner's petition for rehearing, filed February 18, was denied on April 8, with no member of the court requesting a response to the petition or a vote on the suggestion for rehearing en banc.

Petitioner filed its petition for a writ of certiorari on July 7. Respondent chose not to respond to the petition, but this Court requested a response on September 23 and respondent filed a brief in opposition to the petition on October 22, 1983. The Court now summarily reverses the judgment of the Court of Appeals after relating a brief sketch of the procedural history of the case.

II

A threshold jurisdictional question must be addressed to determine whether the Court of Appeals and hence this

Court lack appellate jurisdiction over the order raising the question which the District Court apparently framed *sua sponte* (ignoring the effect of the March 21 letter filed by respondent) and certified for interlocutory review (notwithstanding the other claims arising out of the same nucleus of operative facts which were not time-barred and were set for trial).

Title 28 U. S. C. § 1292(b) and Federal Rule of Appellate Procedure 5(a) require that a petition be filed in the Court of Appeals within 10 days of the date the interlocutory order was certified by the District Court. It is well settled that the 10-day time limit for filing a petition in the Court of Appeals is mandatory and jurisdictional.[1] The jurisdictional question in this case is whether the 10-day time limitation imposed by § 1292(b) and Federal Rule of Appellate Procedure 5(a), a time period which may not be enlarged, Fed. Rule App. Proc. 26(b), can be circumvented by simply reentering the interlocutory order for the sole purpose of extending the time for filing the petition. There is a conflict in the Circuits on this jurisdictional question, compare, *e. g.*, *Woods* v. *Baltimore & Ohio R. Co.*, 441 F. 2d 407, 408 (CA6 1971) *(per curiam)*, and *Nakhleh* v. *Chemical Construction Corp.*, 366 F. Supp. 1221, 1222–1223 (SDNY 1973), with *Aparicio* v.

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[1] *E. g.*, *General Television Arts, Inc.* v. *Southern R. Co.*, 725 F. 2d 1327, 1330 (CA11 1984); *Nuclear Engineering Co.* v. *Scott*, 660 F. 2d 241, 245–248 (CA7 1981), cert. denied *sub nom. Nuclear Engineering Co.* v. *Fahner*, 455 U. S. 993 (1982); *Aparicio* v. *Swan Lake*, 643 F. 2d 1109, 1111 (CA5 1981); *Local P–171* v. *Thompson Farms Co.*, 642 F. 2d 1065, 1068 (CA7 1981); *Atkins* v. *Scott*, 597 F. 2d 872, 879 (CA4 1979); *Braden* v. *University of Pittsburgh*, 552 F. 2d 948, 950–951 (CA3 1977) (en banc); *Cole* v. *Tuttle*, 540 F. 2d 206, 207, n. 2 (CA5 1976); *Hellerstein* v. *Mr. Steak, Inc.*, 531 F. 2d 470, 471–472 (CA10), cert. denied, 429 U. S. 823 (1976); *Hanson* v. *Hunt Oil Co.*, 488 F. 2d 70, 72 (CA8 1973) *(per curiam)*; *Alabama Labor Council* v. *Alabama*, 453 F. 2d 922, 923–925 (CA5 1972); *Woods* v. *Baltimore & Ohio R. Co.*, 441 F. 2d 407, 408 (CA6 1971) *(per curiam)*; see also *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U. S. 737, 745 (1976); cf. *Browder* v. *Director, Illinois Department of Corrections*, 434 U. S. 257 (1978).

Swan Lake, 643 F. 2d, at 1110–1113; see also *Nuclear Engineering Co.* v. *Scott*, 660 F. 2d 241, 245–248 (CA7 1981) (describing the jurisdictional question as a "rather thorny" one, *id.*, at 245, and observing that the principle common to most cases on point "is that a district court may not re-enter a certification order to enlarge the time for appeal when the failure to timely appeal from the original certification order was due solely to mere neglect of counsel," *id.*, at 246), cert. denied *sub nom. Nuclear Engineering Co.* v. *Fahner*, 455 U. S. 993 (1982); *Braden* v. *University of Pittsburgh*, 552 F. 2d 948, 949–955 (CA3 1977) (en banc) (distinguishing *Woods* and *Nakhleh* but suggesting in dictum disagreement with those cases); see generally 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 205.03[2], pp. 5–8 to 5–11 (1983); 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3929, pp. 153–155, § 3951, p. 369 (1977); Note, Interlocutory Appeals in the Federal Courts Under 28 U. S. C. § 1292(b), 88 Harv. L. Rev. 607, 615–616 (1975). It is of course our duty to recognize a jurisdictional question of this kind *sua sponte*.

It is quite plain that the District Court in the instant case recertified the interlocutory order nine months after the time for petitioning had expired for the purpose of permitting what would otherwise be a time-barred interlocutory appeal. While I think the jurisdictional question here is a close one, and believe that we should not decide it in a summary fashion, I concur in the majority's holding that there is jurisdiction. I am presently persuaded by the view, supported by the commentators, that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will.

III

I will not engage in the task of identifying the nature and source of all of the failures to observe the procedural re-

quirements imposed by the Legislature in this case. As to whether it is fair to say on this record that respondent failed to act diligently to preserve her claim when she was acting *pro se*, I think the record largely speaks for itself. I might observe that if there had been strict adherence to the Federal Rules of Civil Procedure, in all likelihood this lawsuit would have ended in January 1982 with the bench trial originally scheduled, rather than stayed indefinitely in order to litigate an issue which would seem to have more relevance to a 19th-century lawyer schooled in technical pleading requirements than a 20th-century federal judge whose first procedural rule is to achieve the just, speedy, and inexpensive termination of litigation.

The question initially framed *sua sponte* by the Magistrate and then *sua sponte* ruled upon by the District Court was never presented in this case. The majority seems to agree with respondent that the statute of limitations issue was not a jurisdictional question, see *Mohasco Corp.* v. *Silver*, 447 U. S., at 811, and n. 9; cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), and hence since petitioner never set forth the affirmative defense of the statute of limitation pursuant to Rule 8(c) (though it "reserved" the right to do so) nor moved to dismiss the Title VII claims as time-barred under Rule 12(b), the District Court erred in dismissing these claims *sua sponte*. Even if the issue were jurisdictional, the question in the case was never whether the right-to-sue letter was a complaint—the question was whether a complaint had been timely filed. The right-to-sue letter was the first document "filed" by respondent, and was apparently treated as a complaint for all practical purposes by the District Court, with the telling exception of failing to trigger issuance of a summons. But the right-to-sue letter was not the only document filed by respondent. *In March she filed a complaint.* Certainly the District Court should not have declined to treat the March letter as a complaint "merely because respondent did not *label*" it as a complaint "for that

would exalt nomenclature over substance." *Browder* v. *Director, Illinois Department of Corrections*, 434 U. S. 257, 272 (1978) (BLACKMUN, J., joined by REHNQUIST, J., concurring); see also *Schlesinger* v. *Councilman*, 420 U. S. 738, 742, n. 5 (1975). If only this *pro se* civil rights plaintiff claiming racial discrimination had been able to grasp the talismanic significance of labeling that document a "complaint," or perhaps a "petition," to use the nomenclature of Judge Varner, the Clerk's office would have mechanically issued a summons, see Fed. Rule Civ. Proc. 4(a), and then petitioner could have filed a motion for a more definite statement pursuant to Rule 12(e) if the complaint did not adequately serve the purposes of modern-day notice pleading.

But of course petitioner would not have needed a more definite statement. The Federal Rules of Civil Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957) (footnote omitted). It would be absurd to suggest that petitioner would not have had fair notice of the claim against it had the documents filed *pro se* by respondent been served upon it. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.*, at 48. Missteps by *pro se* Title VII plaintiffs, it would seem, are not so easily ignored.

Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." We frequently have stated that *pro se* pleadings are to be given a liberal construction. *E. g.*, *Haines* v. *Kerner*, 404 U. S. 519 (1972). If these pronouncements have any meaning, they must protect the *pro se* litigant who simply does not properly denominate her motion or pleading in the terms used in the Federal

Rules. If respondent was not pleading for relief in the District Court, one wonders what the majority thinks she was doing there.

I therefore conclude that had the Federal Rules of Civil Procedure been strictly followed in this case—Rules which eschew the sterile formalism which permeated the approach to this case in the District Court and in this Court—the question certified for interlocutory review would have never been presented. However, that question was answered by the court below, albeit in an unpublished opinion with no precedential significance, and the majority today rushes to disagree with that opinion, ignoring the fact that even if the opinion is incorrect, the judgment reversing the District Court's order dismissing the Title VII claim is correct.[2]

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[2] And, of course, the Court ignores the rule that this Court reviews judgments rather than opinions. See *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956). "Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action." *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59 (1940). "If the judgment should be correct, although the reasoning, by which the mind of the Judge was conducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior Court." *Williams* v. *Norris*, 12 Wheat. 117, 120 (1827). "The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821). See also *Ex parte Royall*, 117 U. S. 241, 250 (1886).

The majority, in *summarily* reversing the judgment below, does not believe it is our duty to examine the record to discover grounds to uphold the judgment below. Yet 28 U. S. C. § 2111 commands:

"On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Even assuming that the opinion of the Court of Appeals is part of the record within the meaning of that statute, but see *Williams* v. *Norris*, 12 Wheat., at 118–120, and assuming that the opinion is erroneous, an examination of the record reveals that the error of the Court of Appeals did not affect the substantial rights of the parties. Cf. *Torres-Valencia* v. *United*

IV

The majority tells us that the Court of Appeals "identified no basis in the statute or its legislative history, cited no decision of this Court, and suggested no persuasive justification

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States, 464 U. S. 44 (1983) (REHNQUIST, J., dissenting) ("Summary disposition is . . . appropriate where a lower court has demonstrably misapplied our cases in a manner which has led to an incorrect result").

Parties may argue any ground in support of a judgment which finds support in the record. *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941); *LeTulle* v. *Scofield*, 308 U. S. 415, 421 (1940); *Langnes* v. *Green*, 282 U. S. 531, 533–539 (1931). And we have previously stated that "in the absence of a claim on [repondent's] part that, conceding the errors exposed by [the lower court] opinion, the judgment is right, we will not examine the record to discover grounds to sustain it." *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 281 (1934). Such a position may have force in a case involving a judgment like that involved in *Indiana Farmer's Guide Publishing Co.* where we have granted review and had full argument and briefing. But see *United States* v. *Spector*, 343 U. S. 169, 180 (1952) (Jackson, J., dissenting) ("It is our duty before reversing a judgment to examine any ground upon which it can be sustained, even a ground which the court below may have overlooked or expressly rejected. . . . The least that could be done would be to order the case reargued"). This case is now here on a petition for certiorari. Respondent has thus largely limited briefing to the reasons the decision below does not merit an exercise of this Court's discretionary jurisdiction. Moreover, respondent has fallen prey to the tendency in § 1292(b) appeals to treat the appeal as limited to the abstract legal question certified, ignoring the point that even in § 1292(b) appeals, it is still the correctness of the order that is the question on appeal.

I had always thought that the burden was on the appellant or petitioner to establish that the judgment of the court below should be reversed. Petitioner asserts that respondent "never actually took the full step required, the filing of some form of complaint or documentation which could be interpreted as a pro se complaint within the time period specified by Congress," Pet. for Cert. 9, but this assertion is not supported by the record. "[I]t is our duty to deal with the case as it is disclosed by the record . . . . A like obligation rests upon counsel." *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.*, 234 U. S. 667, 668 (1914). The substance of respondent's argument on the merits is that under the record facts, she did comply with the time limitation. I find it remarkable that the majority enters a

for its view that the Federal Rules of Civil Procedure were to have a different meaning in, or not apply to, Title VII litigation." *Ante*, at 149–150. Of course, the court below never held that the Federal Rules are inapplicable to Title VII litigation, and I am quite sure it would not do so. What it did was hold that the time limitation created by Title VII was tolled by filing the right-to-sue letter.

The majority rejects the unpublished opinion of the Court of Appeals, but the majority has "identified no basis in the statute or legislative history, cited no decision of this Court, and suggested no persuasive justification for its view" that the court below erred. Instead, the majority seemingly assumes that there is no authority supporting the decision below and simply indicates that the opinion below offers an "unpersuasive" justification. The majority all but ignores the Fifth Circuit's decision in *Wrenn* and the Eighth Circuit's decisions in *Huston* v. *General Motors Corp.*, 477 F. 2d 1003, 1006–1008 (1973), and *Wingfield* v. *Goodwill Industries*, 666 F. 2d 1177, 1179, n. 3 (1981).

"The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'" *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 426 (1965). "In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Id.*, at 427. We have held that even when "a lawsuit is filed" in a court which lacks personal jurisidiction over the defendant, "that

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judgment in a case involving a procedural question of this kind, openly ignoring the contents of the record. If its only interest in this case is to "reverse" the unpublished opinion of the Court of Appeals and if it cannot be bothered with examining the record and rendering a correct judgment, the very least it could do in its summary disposition would be to vacate the judgment below and remand for further proceedings.

filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Goldlawr, Inc.* v. *Heiman*, 369 U. S. 463, 467 (1962). In holding that Congress did not intend to impose any time limitation on enforcement suits by the EEOC, we observed that unlike the litigant in an ordinary private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit when the charge has been filed with the EEOC. *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 372 (1977). Given this remedial scheme, filing the right-to-sue letter and exercising reasonable diligence in the District Court in attempting to obtain counsel and file a formal complaint should toll the statute of limitations. See *Wingfield* v. *Goodwill Industries*, 666 F. 2d, at 1179, n. 3; *Wrenn* v. *American Cast Iron Pipe Co.*, 575 F. 2d 544 (CA5 1978); *Huston* v. *General Motors Corp.*, 477 F. 2d, at 1006–1008; see also *Harris* v. *Walgreen's Distribution Center*, 456 F. 2d 588, 591–592 (CA6 1972) (motion for appointment of counsel tolls limitation period); see generally *Love* v. *Pullman Co.*, 404 U. S. 522, 527 (1972); *Sanchez* v. *Standard Brands, Inc.*, 431 F. 2d 455 (CA5 1970); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998 (CA5 1969); S. Rep. No. 92–415, p. 17, and n. 9 (1971) (noting burden of initiating legal proceedings on Title VII litigants, and citing with approval *Sanchez* v. *Standard Brands, Inc.*, *supra*, and *Pettway* v. *American Cast Iron Pipe Co.*, *supra*).

The Court does not "find anything in the record to call for the application of the doctrine of equitable tolling." *Ante*, at 151. Such an assertion is easily made when the record is reduced to a few conclusory statements. While the April 7 letter from Judge Varner did indicate that she should file a "petition" in the transferee court "to be safe," a fair reading of the entire record would yield the conclusion that respond-

ent was led to believe that she needed an attorney in order "to draft a lawsuit," to paraphrase the language used by the Magistrate in his April 15 order. The right-to-sue letter itself suggested as much as well.

The majority also tells us that it is "not clear from the opinion of the Court of Appeals for how long the statute is tolled." *Ante*, at 151, n. 5. Given the fact that the Court of Appeals was deciding an interlocutory appeal and its opinion was unpublished, the lack of clarity is not surprising. All the Court of Appeals was doing was reviewing a specific order and deciding whether on the facts of the case before it, the District Court erred in entering the order. It is, however, clear that the decision in *Wrenn*, upon which the court below relied, leaves ample room for dismissals when plaintiffs slumber on their rights. See, *e. g.*, *Potts* v. *Southern R. Co.*, 524 F. Supp. 513 (ND Ga. 1981).

In the end, the District Court's dismissal of respondent's race discrimination claim amounted to no more than a sanction for her failure to refile her request for appointment of counsel on the correct forms quickly enough to suit the Magistrate. The majority opinion in this Court amounts to little more, the Court telling us that she "was told three times what she must do to preserve her claim, and she did not do it." *Ante*, at 151. Of course, she had done it, but the majority does not even seem to care.

I respectfully dissent.

OLIVER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82–15. Argued November 9, 1983—Decided April 17, 1984*

In No. 82–15, acting on reports that marihuana was being raised on petitioner's farm, narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign, but with a footpath around one side. The agents then walked around the gate and along the road and found a field of marihuana over a mile from petitioner's house. Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance" in violation of a federal statute. After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field, applying *Katz* v. *United States*, 389 U. S. 347, and holding that petitioner had a reasonable expectation that the field would remain private and that it was not an "open" field that invited casual intrusion. The Court of Appeals reversed, holding that *Katz* had not impaired the vitality of the open fields doctrine of *Hester* v. *United States*, 265 U. S. 57, which permits police officers to enter and search a field without a warrant. In No. 82–1273, after receiving a tip that marihuana was being grown in the woods behind respondent's residence, police officers entered the woods by a path between the residence and a neighboring house, and followed a path through the woods until they reached two marihuana patches fenced with chicken wire and having "No Trespassing" signs. Later, the officers, upon determining that the patches were on respondent's property, obtained a search warrant and seized the marihuana. Respondent was then arrested and indicted. The Maine trial court granted respondent's motion to suppress the fruits of the second search, holding that the initial warrantless search was unreasonable, that the "No Trespassing" signs and secluded location of the marihuana patches evinced a reasonable expectation of privacy, and that therefore the open fields doctrine did not apply. The Maine Supreme Judicial Court affirmed.

Held: The open fields doctrine should be applied in both cases to determine whether the discovery or seizure of the marihuana in question was valid. Pp. 176–184.

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*Together with No. 82–1273, *Maine* v. *Thornton*, on certiorari to the Supreme Judicial Court of Maine.

(a) That doctrine was founded upon the explicit language of the Fourth Amendment, whose special protection accorded to "persons, houses, papers, and effects" does "not exten[d] to the open fields." *Hester* v. *United States*, *supra*, at 59. Open fields are not "effects" within the meaning of the Amendment, the term "effects" being less inclusive than "property" and not encompassing open fields. The government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Amendment. Pp. 176–177.

(b) Since *Katz* v. *United States*, *supra*, the touchstone of Fourth Amendment analysis has been whether a person has a "constitutionally protected reasonable expectation of privacy." *Id.*, at 360. The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" *Id.*, at 361. Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Moreover, the common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach to the home, conversely implies that no expectation of privacy legitimately attaches to open fields. Pp. 177–181.

(c) Analysis of the circumstances of the search of an open field on a case-by-case basis to determine whether reasonable expectations of privacy were violated would not provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Such an ad hoc approach not only would make it difficult for the policeman to discern the scope of his authority but also would create the danger that constitutional rights would be arbitrarily and inequitably enforced. Pp. 181–182.

(d) Steps taken to protect privacy, such as planting the marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment. The fact that the government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. Pp. 182–184.

686 F. 2d 356, affirmed; 453 A. 2d 489, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I and II of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 184. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 184.

Frank E. Haddad, Jr., argued the cause for petitioner in No. 82–15. With him on the briefs was *Robert L. Wilson*. *Wayne S. Moss*, Assistant Attorney General of Maine, argued the cause for petitioner in No. 82–1273. With him on the briefs were *James E. Tierney*, Attorney General, *James W. Brannigan, Jr.*, Deputy Attorney General, *Robert S. Frank*, Assistant Attorney General, and *David W. Crook*.

Alan I. Horowitz argued the cause for the United States in No. 82–15. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Frey*. *Donna L. Zeegers*, by appointment of the Court, 461 U. S. 924, argued the cause and filed a brief for respondent in No. 82–1273.†

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†Briefs of *amici curiae* urging reversal in No. 82–15 were filed for the American Civil Liberties Union of Northern California et al. by *Eric Neisser*, *Alan Schlosser*, *Amitai Schwartz*, *Joaquin G. Avila*, *Morris J. Baller*, and *John E. Huerta;* and for the California Farm Bureau Federation et al. by *Thomas F. Olson*.

Briefs of *amici curiae* urging affirmance in No. 82–15 were filed for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak;* for the State of California by *John K. Van De Kamp*, Attorney General, *Harley D. Mayfield*, Assistant Attorney General, and *Jay M. Bloom*, Deputy Attorney General.

A brief of *amici curiae* was filed in No. 82–1273 for the State of Alabama et al. by *Charles A. Graddick*, Attorney General of Alabama, and *Joseph G. L. Marston III*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Norman C. Gorsuch* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Robert T. Stephen* of Kansas, *Steven L. Beshear* of Kentucky, *Paul L. Douglas* of Nebraska, *David L. Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming.

JUSTICE POWELL delivered the opinion of the Court.

The "open fields" doctrine, first enunciated by this Court in *Hester* v. *United States*, 265 U. S. 57 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the doctrine.

I

No. 82–15. Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate.[1] Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." 21 U. S. C. § 841(a)(1). After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field. Applying *Katz* v. *United States*, 389 U. S. 347, 357 (1967), the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. App. to Pet. for Cert. in No. 82–15,

[1] It is conceded that the police did not have a warrant authorizing the search, that there was no probable cause for the search, and that no exception to the warrant requirement is applicable.

pp. 23–24. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

The Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. 686 F. 2d 356 (1982).[2] The court concluded that *Katz*, upon which the District Court relied, had not impaired the vitality of the open fields doctrine of *Hester*. Rather, the open fields doctrine was entirely compatible with *Katz*' emphasis on privacy. The court reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields, and that the property owner's common-law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection. 686 F. 2d, at 360.[3] We granted certiorari. 459 U. S. 1168 (1983).

No. 82–1273. After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent, obtained a warrant to search the property, and seized the marihuana. On the basis of this evidence, respondent was arrested and indicted.

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[2] A panel of the Sixth Circuit had affirmed the suppression order. 657 F. 2d 85 (1981).

[3] The four dissenting judges contended that the open fields doctrine did not apply where, as in this case, "reasonable effort[s] [have] been made to exclude the public." 686 F. 2d, at 372. To that extent, the dissent considered that *Katz* v. *United States* implicitly had overruled previous holdings of this Court. The dissent then concluded that petitioner had established a "reasonable expectation of privacy" under the *Katz* standard. Judge Lively also wrote separately to argue that the open fields doctrine applied only to lands that could be viewed by the public.

The trial court granted respondent's motion to suppress the fruits of the second search. The warrant for this search was premised on information that the police had obtained during their previous warrantless search, that the court found to be unreasonable.[4] "No Trespassing" signs and the secluded location of the marihuana patches evinced a reasonable expectation of privacy. Therefore, the court held, the open fields doctrine did not apply.

The Maine Supreme Judicial Court affirmed. 453 A. 2d 489 (1982). It agreed with the trial court that the correct question was whether the search "is a violation of privacy on which the individual justifiably relied," *id.*, at 493, and that the search violated respondent's privacy. The court also agreed that the open fields doctrine did not justify the search. That doctrine applies, according to the court, only when officers are lawfully present on property and observe "open and patent" activity. *Id.*, at 495. In this case, the officers had trespassed upon defendant's property, and the respondent had made every effort to conceal his activity. We granted certiorari. 460 U. S. 1068 (1983).[5]

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[4] The court also discredited other information, supplied by a confidential informant, upon which the police had based their warrant application.

[5] Respondent contends that the decision below rests upon adequate and independent state-law grounds. We do not read that decision, however, as excluding the evidence because the search violated the State Constitution. The Maine Supreme Judicial Court referred only to the Fourth Amendment of the Federal Constitution and purported to apply the *Katz* test; the prior state cases that the court cited also construed the Federal Constitution. In any case, the Maine Supreme Judicial Court did not articulate an independent state ground with the clarity required by *Michigan* v. *Long*, 463 U. S. 1032 (1983).

Contrary to respondent's assertion, we do not review here the state courts' finding as a matter of "fact" that the area searched was not an "open field." Rather, the question before us is the appropriate legal standard for determining whether search of that area without a warrant was lawful under the Federal Constitution.

The conflict between the two cases that we review here is illustrative of the confusion the open fields doctrine has generated among the state and

II

The rule announced in *Hester* v. *United States* was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Hester* v. *United States*, 265 U. S., at 59.[6]

Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth

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federal courts. Compare, *e. g.*, *State* v. *Byers*, 359 So. 2d 84 (La. 1978) (refusing to apply open fields doctrine); *State* v. *Brady*, 406 So. 2d 1093 (Fla. 1981) (same), with *United States* v. *Lace*, 669 F. 2d 46, 50–51 (CA2 1982); *United States* v. *Freie*, 545 F. 2d 1217 (CA9 1976); *United States* v. *Brown*, 473 F. 2d 952, 954 (CA5 1973); *Atwell* v. *United States*, 414 F. 2d 136, 138 (CA5 1969).

[6]The dissent offers no basis for its suggestion that *Hester* rests upon some narrow, unarticulated principle rather than upon the reasoning enunciated by the Court's opinion in that case. Nor have subsequent cases discredited *Hester*'s reasoning. This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections. See, *e. g.*, *Robbins* v. *California*, 453 U. S. 420, 426 (1981) (opinion of Stewart, J.); *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980); *Alderman* v. *United States*, 394 U. S. 165, 178–180 (1969). As these cases, decided after *Katz*, indicate, *Katz*' "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language. *Katz* itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and *Katz*' fundamental recognition that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," see 389 U. S., at 353, is faithful to the Amendment's language. As *Katz* demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism. In contrast, the dissent's approach would ignore the language of the Constitution itself as well as overturn this Court's governing precedent.

Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures . . . ." See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100, n. 77 (1937). Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, *id.*, at 100–103, the term "effects" is less inclusive than "property" and cannot be said to encompass open fields.[7] We conclude, as did the Court in deciding *Hester* v. *United States*, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

III

This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since *Katz* v. *United States*, 389 U. S. 347 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." *Id.*, at 360 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" *Id.*, at 361. See also *Smith* v. *Maryland*, 442 U. S. 735, 740–741 (1979).

A

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See *Rakas* v. *Illinois*, 439 U. S. 128, 152–153

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[7] The Framers would have understood the term "effects" to be limited to personal, rather than real, property. See generally *Doe* v. *Dring*, 2 M. & S. 448, 454, 105 Eng. Rep. 447, 449 (K. B. 1814) (discussing prior cases); 2 W. Blackstone, Commentaries *16, *384–*385.

(1978) (POWELL, J., concurring). In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, *e. g.*, *United States* v. *Chadwick*, 433 U. S. 1, 7–8 (1977), the uses to which the individual has put a location, *e. g.*, *Jones* v. *United States*, 362 U. S. 257, 265 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, *e. g.*, *Payton* v. *New York*, 445 U. S. 573 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

In this light, the rule of *Hester* v. *United States*, *supra*, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton* v. *New York*, *supra*, at 601.[8] See also *Silverman* v. *United States*, 365 U. S. 505, 511 (1961); *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972).

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[8]The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 311 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 355 (1977).

In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air.[9] For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."[10]

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[9] Tr. of Oral Arg. 14–15, 58. See, *e. g.*, *United States* v. *Allen*, 675 F. 2d 1373, 1380–1381 (CA9 1980); *United States* v. *DeBacker*, 493 F. Supp. 1078, 1081 (WD Mich. 1980). In practical terms, petitioner Oliver's and respondent Thornton's analysis merely would require law enforcement officers, in most situations, to use aerial surveillance to gather the information necessary to obtain a warrant or to justify warrantless entry onto the property. It is not easy to see how such a requirement would advance legitimate privacy interests.

[10] The dissent conceives of open fields as bustling with private activity as diverse as lovers' trysts and worship services. *Post*, at 191–193. But in most instances police will disturb no one when they enter upon open fields. These fields, by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment. One need think only of the vast expanse of some western ranches or of the undeveloped woods of the Northwest to see the unreality of the dissent's conception. Further, the Fourth Amendment provides ample protection to activities in the open fields that might implicate an individual's privacy. An individual who enters a place defined to be "public" for Fourth Amendment analysis does not lose all claims to privacy or personal security. Cf. *Arkansas* v. *Sanders*, 442 U. S. 753, 766–767 (1979) (BURGER, C. J., concurring in judgment). For example, the Fourth Amendment's protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411 (1976).

The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes, writing for the Court, observed in *Hester*, 265 U. S., at 59, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. See 4 W. Blackstone, Commentaries *225. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, *e. g.*, *United States* v. *Van Dyke*, 643 F. 2d 992, 993–994 (CA4 1981); *United States* v. *Williams*, 581 F. 2d 451, 453 (CA5 1978); *Care* v. *United States*, 231 F. 2d 22, 25 (CA10), cert. denied, 351 U. S. 932 (1956). Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields.[11]

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[11] Neither petitioner Oliver nor respondent Thornton has contended that the property searched was within the curtilage. Nor is it necessary in these cases to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself. It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, contrary to respondent Thornton's suggestion, Tr. of Oral Arg. 21–22, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment. See, *e. g.*, *United States* v. *Pruitt*, 464 F. 2d 494 (CA9 1972); *Bedell* v. *State*, 257 Ark. 895, 521 S. W. 2d 200 (1975).

We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

Petitioner Oliver and respondent Thornton contend, to the contrary, that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis. The language of the Fourth Amendment itself answers their contention.

Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . .'" *New York* v. *Belton*, 453 U. S. 454, 458 (1981) (quoting LaFave, "Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 S. Ct. Rev. 127, 142). This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. See *Belton*, *supra*, at 458–460; *Robbins* v. *California*, 453 U. S. 420, 430 (1981) (POWELL, J., concurring in judgment); *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979); *United States* v. *Robinson*, 414 U. S. 218, 235 (1973). The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, *Belton*, *supra*, at 460; it also creates a danger that consti-

tutional rights will be arbitrarily and inequitably enforced. Cf. *Smith* v. *Goguen*, 415 U. S. 566, 572–573 (1974).[12]

IV

In any event, while the factors that petitioner Oliver and respondent Thornton urge the courts to consider may be relevant to Fourth Amendment analysis in some contexts, these factors cannot be decisive on the question whether the search of an open field is subject to the Amendment. Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity.[13] Rather, the correct inquiry is whether the government's intrusion infringes upon the per-

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[12] The clarity of the open fields doctrine that we reaffirm today is not sacrificed, as the dissent suggests, by our recognition that the curtilage remains within the protections of the Fourth Amendment. Most of the many millions of acres that are "open fields" are not close to any structure and so not arguably within the curtilage. And, for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment advocated by the dissent.

[13] Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post "No Trespassing" signs.

sonal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. "'The premise that property interests control the right of the Government to search and seize has been discredited.'" *Katz*, 389 U. S., at 353 (quoting *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967)). "[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Rakas* v. *Illinois*, 439 U. S., at 144, n. 12.

The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. *Id.*, at 153 (POWELL, J., concurring).[14] The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest.[15] Thus, in the case of open fields, the general

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[14] As noted above, the common-law conception of the "curtilage" has served this function.

[15] The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title. See, *e. g.*,

rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

We conclude that the open fields doctrine, as enunciated in *Hester*, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in *Hester* accords with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm *Oliver* v. *United States; Maine* v. *Thornton* is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring in part and concurring in the judgment.

I concur in the judgment and join Parts I and II of the Court's opinion. These Parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a "house" or an "effect."

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

In each of these consolidated cases, police officers, ignoring clearly visible "No Trespassing" signs, entered upon private land in search of evidence of a crime. At a spot that could

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O. Holmes, The Common Law 98–100, 244–246 (1881). In any event, unlicensed use of property by others is presumptively unjustified, as anyone who wishes to use the property is free to bargain for the right to do so with the property owner, cf. R. Posner, Economic Analysis of Law 10–13, 21 (1973). For these reasons, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.

not be seen from any vantage point accessible to the public, the police discovered contraband, which was subsequently used to incriminate the owner of the land. In neither case did the police have a warrant authorizing their activities.

The Court holds that police conduct of this sort does not constitute an "unreasonable search" within the meaning of the Fourth Amendment. The Court reaches that startling conclusion by two independent analytical routes. First, the Court argues that, because the Fourth Amendment by its terms renders people secure in their "persons, houses, papers, and effects," it is inapplicable to trespasses upon land not lying within the curtilage of a dwelling. *Ante*, at 176–177. Second, the Court contends that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Ante*, at 178. Because I cannot agree with either of these propositions, I dissent.

I

The first ground on which the Court rests its decision is that the Fourth Amendment "indicates with some precision the places and things encompassed by its protections," and that real property is not included in the list of protected spaces and possessions. *Ante*, at 176. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect;[1] yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation. *Katz* v. *United States*, 389 U. S. 347 (1967). Nor can it plau-

[1] The Court informs us that the Framers would have understood the term "effects" to encompass only personal property. *Ante*, at 177, n. 7. Such a construction of the term would exclude both a public phone booth and spoken words.

sibly be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 311 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 358–359 (1977).[2]

Indeed, the Court's reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case. The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. *Ante*, at 180. We are not told, however, whether the curtilage is a "house" or an "effect"—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.

The Court's inability to reconcile its parsimonious reading of the phrase "persons, houses, papers, and effects" with our prior decisions or even its own holding is a symptom of a more fundamental infirmity in the Court's reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with "precision" permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion.[3] We do not construe constitutional pro-

[2] On the other hand, an automobile surely does constitute an "effect." Under the Court's theory, cars should therefore stand on the same constitutional footing as houses. Our cases establish, however, that car owners' diminished expectations that their cars will remain free from prying eyes warrants a corresponding reduction in the constitutional protection accorded cars. *E. g.*, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561 (1976).

[3] By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, see *Barron* v. *Mayor and City Council of Baltimore*, 7 Pet. 243 (1833), but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions, see, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (First Amendment); *Wolf* v. *Colorado*, 338 U. S. 25 (1949) (Fourth Amendment).

visions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete.[4] Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.[5]

The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom "from unreasonable government intrusions into . . . legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U. S. 1, 7 (1977). That freedom would be incompletely protected if only government conduct that impinged upon a person, house, paper, or effect were subject to constitutional scrutiny. Accordingly, we have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of property. In *Katz* v. *United States*, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it "protects people, not places." 389 U. S., at 351. Since that time we have consistently adhered

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[4] Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding." Such a document cannot be as detailed as a "legal code"; "[i]ts nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves") (emphasis in original).

[5] Our rejection of the mode of interpretation appropriate for statutes is perhaps clearest in our treatment of the First Amendment. That Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press" but says nothing, for example, about restrictions on expressive behavior or about access to the courts. Yet, to give effect to the purpose of the Amendment, we have applied it to regulations of conduct designed to convey a message, *e. g.*, *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), and have accorded constitutional protection to the public's "right of access to criminal trials," *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 604–605 (1982).

to the view that the applicability of the provision depends solely upon "whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979).[6] The Court's contention that, because a field is not a house or effect, it is not covered by the Fourth Amendment is inconsistent with this line of cases and with the understanding of the nature of constitutional adjudication from which it derives.[7]

II

The second ground for the Court's decision is its contention that any interest a landowner might have in the privacy of his woods and fields is not one that "society is prepared to recognize as 'reasonable.'" *Ante*, at 177 (quoting *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring)).

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[6] See also *United States* v. *Chadwick*, 433 U. S. 1, 7, 11 (1977) (disagreeing with the suggestion that the Fourth Amendment "protects only dwellings and other specifically designated locales"; asserting instead that the purpose of the Amendment "is to safeguard individuals from unreasonable government invasions of legitimate privacy interests"); *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978) (holding that the determinative question is "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place").

Our most recent decisions continue to rely on the conception of the purpose and scope of the Fourth Amendment that we enunciated in *Katz*. See, *e. g.*, *United States* v. *Jacobsen*, *ante*, at 113–118; *Michigan* v. *Clifford*, 464 U. S. 287, 292–293 (1984); *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983); *United States* v. *Place*, 462 U. S. 696, 706–707 (1983); *Texas* v. *Brown*, 460 U. S. 730, 738–740 (1983) (plurality opinion); *United States* v. *Knotts*, 460 U. S. 276, 280–281 (1983).

[7] Sensitive to the weakness of its argument that the "persons or things" mentioned in the Fourth Amendment exhaust the coverage of the provision, the Court goes on to analyze at length the privacy interests that might legitimately be asserted in "open fields." The inclusion of Parts III and IV in the opinion, coupled with the Court's reaffirmation of *Katz* and its progeny, *ante*, at 177, strongly suggests that the plain-language theory sketched in Part II of the Court's opinion will have little or no effect on our future decisions in this area.

The mode of analysis that underlies this assertion is certainly more consistent with our prior decisions than that discussed above. But the Court's conclusion cannot withstand scrutiny.

As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." *Ante*, at 177–178. Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect.[8] When the expectations of privacy asserted by petitioner Oliver and respondent Thornton[9] are examined through these lenses, it becomes clear that those expectations are entitled to constitutional protection.

A

We have frequently acknowledged that privacy interests are not coterminous with property rights. *E. g.*, *United States* v. *Salvucci*, 448 U. S. 83, 91 (1980). However, because "property rights reflect society's explicit recognition

[8]The privacy interests protected by the Fourth Amendment are not limited to expectations that physical areas will remain free from public and government intrusion. See *supra*, at 187–188. The factors relevant to the assessment of the reasonableness of a nonspatial privacy interest may well be different from the three considerations discussed here. See, *e. g.*, *Smith* v. *Maryland*, 442 U. S. 735, 747–748 (1979) (Stewart, J., dissenting); *id.*, at 750–752 (MARSHALL, J., dissenting).

[9]The Court does not dispute that Oliver and Thornton had subjective expectations of privacy, nor could it in view of the lower courts' findings on that issue. See *United States* v. *Oliver*, No. CR80–00005–01–BG (WD Ky., Nov. 14, 1980), App. to Pet. for Cert. in No. 82–15, pp. 19–20; *Maine* v. *Thornton*, No. CR82–10 (Me. Super. Ct., Apr. 16, 1982), App. to Pet. for Cert. in No. 82–1273, pp. B–4—B–5.

of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." *Rakas* v. *Illinois*, 439 U. S. 128, 153 (1978) (POWELL, J., concurring).[10] Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, . . . one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Id.*, at 144, n. 12 (opinion of the Court).[11]

It is undisputed that Oliver and Thornton each owned the land into which the police intruded. That fact alone provides considerable support for their assertion of legitimate privacy interests in their woods and fields. But even more telling is the nature of the sanctions that Oliver and Thornton could invoke, under local law, for violation of their property rights. In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. Ky. Rev. Stat. §§ 511.070(1), 511.080, 511.090(4) (1975). The law in Maine is similar. An intrusion into "any place from

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[10] The Court today seeks to evade the force of this principle by contending that the law of property is designed to serve various "prophylactic" and "economic" purposes unrelated to the protection of privacy. *Ante*, at 183–184, and n. 15. Such efforts to rationalize the distribution of entitlements under state law are interesting and may have some explanatory power, but cannot support the weight the Court seeks to place upon them. The Court surely must concede that *one* of the purposes of the law of real property (and specifically the law of criminal trespass, see *infra*, this page and 191, and n. 12) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities. The views of commentators, old and new, as to other functions served by positive law are thus insufficient to support the Court's sweeping assertion that "in the case of open fields, the general rights of property . . . have little or no relevance to the applicability of the Fourth Amendment," *ante*, at 183–184.

[11] See also *Rawlings* v. *Kentucky*, 448 U. S. 98, 112 (1980) (BLACKMUN, J., concurring).

which [the intruder] may lawfully be excluded and which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders or which is fenced or otherwise enclosed" is a crime. Me. Rev. Stat. Ann., Tit. 17A, § 402(1)(C) (1964).[12] Thus, positive law not only recognizes the legitimacy of Oliver's and Thornton's insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court's assertion that Oliver's and Thornton's expectations of privacy were not of a sort that society is prepared to recognize as reasonable.

B

The uses to which a place is put are highly relevant to the assessment of a privacy interest asserted therein. *Rakas* v. *Illinois*, *supra*, at 153 (POWELL, J., concurring). If, in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or government officials, we extend the protection of the Fourth Amendment to the space in question, even in the absence of any entitlement derived from positive law. *E. g.*, *Katz* v. *United States*, 389 U. S., at 352–353.[13]

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[12] Cf. Comment to ALI, Model Penal Code § 221.2, p. 87 (1980) ("The common thread running through these provisions [a sample of state criminal trespass laws] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter. Most people do not object to strangers tramping through woodland or over pasture or open range. On the other hand, intrusions into buildings, onto property fenced in a manner manifestly designed to exclude intruders, or onto any private property in defiance of actual notice to keep away is generally considered objectionable and under some circumstances frightening").

[13] In most circumstances, this inquiry requires analysis of the sorts of uses to which a given space is susceptible, not the manner in which the person asserting an expectation of privacy in the space was in fact employing

Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property.[14] Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind.[15] Our respect for the freedom of landowners to use

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it. See, *e. g.*, *United States* v. *Chadwick*, 433 U. S., at 13. We make exceptions to this principle and evaluate uses on a case-by-case basis in only two contexts: when called upon to assess (what formerly was called) the "standing" of a particular person to challenge an intrusion by government officials into a area over which that person lacked primary control, see, *e. g.*, *Rakas* v. *Illinois*, 439 U. S., at 148–149; *Jones* v. *United States*, 362 U. S. 257, 265–266 (1960), and when it is possible to ascertain how a person is using a particular space without violating the very privacy interest he is asserting, see, *e. g.*, *Katz* v. *United States*, 389 U. S., at 352. (In cases of the latter sort, the inquiries described in this Part and in Part II–C, *infra*, are coextensive). Neither of these exceptions is applicable here. Thus, the majority's contention that, because the cultivation of marihuana is not an activity that society wishes to protect, Oliver and Thornton had no legitimate privacy interest in their fields, *ante*, at 182–183, and n. 13, reflects a misunderstanding of the level of generality on which the constitutional analysis must proceed.

[14] We accord constitutional protection to businesses conducted in office buildings, see *supra*, at 185–186; it is not apparent why businesses conducted in fields that are not open to the public are less deserving of the benefit of the Fourth Amendment.

[15] This last-mentioned use implicates a kind of privacy interest somewhat different from those to which we are accustomed. It involves neither a person's interest in immunity from observation nor a person's interest in shielding from scrutiny the residues and manifestations of his personal life. Cf. Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 52–54 (1974). It derives, rather, from a person's desire to preserve inviolate a portion of his world. The idiosyncracy of this interest does not, however, render it less deserving of constitutional protection.

their posted "open fields" in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces, see *supra*, at 190–191, and substantially reinforces the landowners' contention that their expectations of privacy are "reasonable."

C

Whether a person "took normal precautions to maintain his privacy" in a given space affects whether his interest is one protected by the Fourth Amendment. *Rawlings* v. *Kentucky*, 448 U. S. 98, 105 (1980).[16] The reason why such precautions are relevant is that we do not insist that a person who has a right to exclude others exercise that right. A claim to privacy is therefore strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance.

Certain spaces are so presumptively private that signals of this sort are unnecessary; a homeowner need not post a "Do Not Enter" sign on his door in order to deny entrance to uninvited guests.[17] Privacy interests in other spaces are more ambiguous, and the taking of precautions is consequently more important; placing a lock on one's footlocker strengthens one's claim that an examination of its contents is impermissible. See *United States* v. *Chadwick*, 433 U. S., at 11. Still other spaces are, by positive law and social convention, presumed accessible to members of the public *unless* the owner manifests his intention to exclude them.

Undeveloped land falls into the last-mentioned category. If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not wel-

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[16] See also *Rakas* v. *Illinois*, *supra*, at 152 (POWELL, J., concurring); *United States* v. *Chadwick*, *supra*, at 11; *Katz* v. *United States*, *supra*, at 352.

[17] However, if the homeowner acts affirmatively to invite someone into his abode, he cannot later insist that his privacy interests have been violated. *Lewis* v. *United States*, 385 U. S. 206 (1966).

come, he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials. Accordingly, we have held that an official may, without a warrant, enter private land from which the public is not excluded and make observations from that vantage point. *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974). Fairly read, the case on which the majority so heavily relies, *Hester* v. *United States*, 265 U. S. 57 (1924), affirms little more than the foregoing unremarkable proposition. From aught that appears in the opinion in that case, the defendants, fleeing from revenue agents who had observed them committing a crime, abandoned incriminating evidence on private land from which the public had not been excluded. Under such circumstances, it is not surprising that the Court was unpersuaded by the defendants' argument that the entry onto their fields by the agents violated the Fourth Amendment.[18]

A very different case is presented when the owner of undeveloped land has taken precautions to exclude the public. As indicated above, a deliberate entry by a private citizen onto private property marked with "No Trespassing" signs will expose him to criminal liability. I see no reason why a government official should not be obliged to respect such

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[18] An argument supportive of the position taken by the Court today might be constructed on the basis of an examination of the record in *Hester*. It appears that, in his approach to the house, one of the agents crossed a pasture fence. See Tr. of Record in *Hester* v. *United States*, O. T. 1923, No. 243, p. 16. However, the Court, in its opinion, placed no weight upon—indeed, did not even mention—that circumstance.

In any event, to the extent that *Hester* may be read to support a rule any broader than that stated in *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U. S. 861 (1974), it is undercut by our decision in *Katz*, which repudiated the locational theory of the coverage of the Fourth Amendment enunciated in *Olmstead* v. *United States*, 277 U. S. 438 (1928), and by the line of decisions originating in *Katz*, see *supra*, at 187–188, and n. 6.

unequivocal and universally understood manifestations of a landowner's desire for privacy.[19]

In sum, examination of the three principal criteria we have traditionally used for assessing the reasonableness of a person's expectation that a given space would remain private indicates that interests of the sort asserted by Oliver and Thornton are entitled to constitutional protection. An owner's right to insist that others stay off his posted land is firmly grounded in positive law. Many of the uses to which such land may be put deserve privacy. And, by marking the boundaries of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires.

The police in these cases proffered no justification for their invasions of Oliver's and Thornton's privacy interests; in neither case was the entry legitimated by a warrant or by one of the established exceptions to the warrant requirement. I conclude, therefore, that the searches of their land violated the Fourth Amendment, and the evidence obtained in the course of those searches should have been suppressed.

III

A clear, easily administrable rule emerges from the analysis set forth above: Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures. One of the advantages of the foregoing rule is that

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[19] Indeed, important practical considerations suggest that the police should not be empowered to invade land closed to the public. In many parts of the country, landowners feel entitled to use self-help in expelling trespassers from their posted property. There is thus a serious risk that police officers, making unannounced, warrantless searches of "open fields," will become involved in violent confrontations with irate landowners, with potentially tragic results. Cf. *McDonald* v. *United States*, 335 U. S. 451, 460–461 (1948) (Jackson, J., concurring).

it draws upon a doctrine already familiar to both citizens and government officials. In each jurisdiction, a substantial body of statutory and case law defines the precautions a landowner must take in order to avail himself of the sanctions of the criminal law. The police know that body of law, because they are entrusted with responsibility for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.

By contrast, the doctrine announced by the Court today is incapable of determinate application. Police officers, making warrantless entries upon private land, will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone.[20] In addition, we may expect to see a spate of litigation over the question of how much improvement is necessary to remove private land from the category of "unoccupied or undeveloped area" to which the "open fields exception" is now deemed applicable. See *ante*, at 180, n. 11.

The Court's holding not only ill serves the need to make constitutional doctrine "workable for application by rank-and-file, trained police officers," *Illinois* v. *Andreas*, 463 U. S. 765, 772 (1983), it withdraws the shield of the Fourth Amendment from privacy interests that clearly deserve protection. By exempting from the coverage of the Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant. Cf., *e. g.*, *United States* v. *Lace*, 669 F. 2d 46, 54 (CA2 1982) (Newman, J., concurring in result) ("[W]hen police officers execute military maneuvers on residential property for three weeks of round-the-clock surveillance, can that be called 'rea-

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[20] The likelihood that the police will err in making such judgments is suggested by the difficulty experienced by courts when trying to define the curtilage of dwellings. See, *e. g.*, *United States* v. *Berrong*, 712 F. 2d 1370, 1374, and n. 7 (CA11 1983), cert. pending, No. 83-988; *United States* v. *Van Dyke*, 643 F. 2d 992, 993-994 (CA4 1981).

sonable'?"); *State* v. *Brady*, 406 So. 2d 1093, 1094–1095 (Fla. 1981) ("In order to position surveillance groups around the ranch's airfield, deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, cut or cross posted fences, and proceed several hundred yards to their hiding places"), cert. granted, 456 U. S. 988, supplemental memoranda ordered and oral argument postponed, 459 U. S. 986 (1982).[21]

The Fourth Amendment, properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled "to be let alone" by their governments. *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting); cf. *Smith* v. *Maryland*, 442 U. S., at 750 (MARSHALL, J., dissenting). The Court's opinion bespeaks and will help to promote an impoverished vision of that fundamental right.

I dissent.

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[21] Perhaps the most serious danger in the decision today is that, if the police are permitted routinely to engage in such behavior, it will gradually become less offensive to us all. As Justice Brandeis once observed: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law . . . ." *Olmstead* v. *United States*, 277 U. S., at 485 (dissenting opinion). See also *Solem* v. *Stumes*, 465 U. S. 638, 667 (1984) (STEVENS, J., dissenting).

SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 82–708. Argued February 29, 1984—Decided April 17, 1984

Petitioner owns the fee title to the Ballona Lagoon, a narrow body of water connected to a manmade harbor located in the city of Los Angeles on the Pacific Ocean. The lagoon became part of the United States following the war with Mexico, which was formally ended by the Treaty of Guadalupe Hidalgo in 1848. Petitioner's predecessors-in-interest had their interest in the lagoon confirmed in federal patent proceedings pursuant to an 1851 Act that had been enacted to implement the treaty, and that provided that the validity of claims to California lands would be decided according to Mexican law. California made no claim to any interest in the lagoon at the time of the patent proceedings, and no mention was made of any such interest in the patent that was issued. Los Angeles brought suit against petitioner in a California state court, alleging that the city held an easement in the Ballona Lagoon for commerce, navigation, fishing, passage of fresh water to canals, and water recreation, such an easement having been acquired at the time California became a State. California was joined as a defendant as required by state law and filed a cross-complaint alleging that it had acquired such an easement upon its admission to the Union and had granted this interest to the city. The trial court ruled in favor of the city and State, finding that the lagoon was subject to the claimed public trust easement. The California Supreme Court affirmed, rejecting petitioner's arguments that the lagoon had never been tideland, that even if it had been, Mexican law imposed no servitude on the fee interest by reason of that fact, and that even if it were tideland and subject to servitude under Mexican law, such a servitude was forfeited by the State's failure to assert it in the federal patent proceedings.

Held: California cannot at this late date assert its public trust easement over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in the federal patent proceedings. The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest must have been presented in the patent proceedings or be barred. Cf. *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Ins. & Trust*

Co., 265 U. S. 472; *United States* v. *Coronado Beach Co.*, 255 U. S. 472. Pp. 205–209.

31 Cal. 3d 288, 644 P. 2d 792, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined except MARSHALL, J., who took no part in the decision of the case.

Warren M. Christopher argued the cause for petitioner. With him on the briefs were *Henry C. Thumann*, *Zoe E. Baird*, *William M. Bitting*, and *Steven W. Bacon*.

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Dirk D. Snel*, and *Richard J. Lazarus*.

Nancy Alvarado Saggese, Deputy Attorney General of California, argued the cause for respondents. With her on the brief for respondent State of California were *John K. Van De Kamp*, Attorney General, and *N. Gregory Taylor*, Assistant Attorney General. *Gary R. Netzer*, *Ira Reiner*, and *Norman L. Roberts* filed a brief for respondent City of Los Angeles.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner owns the fee title to property known as the Ballona Lagoon, a narrow body of water connected to Marina del Rey, a manmade harbor located in a part of the city of

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**Edgar B. Washburn* and *Nancy J. Stivers* filed a brief for the California Land Title Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Audubon Society et al. by *Palmer Brown Madden* and *Linda Agerter*; and for Amigos de Bolsa Chica by *Lynda Martyn*.

Briefs of *amici curiae* were filed for the State of Texas by *Jim Mattox*, Attorney General, *David R. Richards*, Executive Assistant Attorney General, and *Jim Mathews*, *R. Lambeth Townsend*, and *Ginny Agnew*, Assistant Attorneys General; and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley*.

Los Angeles called Venice. Venice is located on the Pacific Ocean between the Los Angeles International Airport and the city of Santa Monica. The present case arises from a lawsuit brought by respondent city of Los Angeles against petitioner Summa Corp. in state court, in which the city alleged that it held an easement in the Ballona Lagoon for commerce, navigation, and fishing, for the passage of fresh waters to the Venice Canals, and for water recreation. The State of California, joined as a defendant as required by state law, filed a cross-complaint alleging that it had acquired an interest in the lagoon for commerce, navigation, and fishing upon its admission to the Union, that it held this interest in trust for the public, and that it had granted this interest to the city of Los Angeles. The city's complaint indicated that it wanted to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner's property. The trial court ruled in favor of respondents, finding that the lagoon was subject to the public trust easement claimed by the city and the State, who had the right to construct improvements in the lagoon without exercising the power of eminent domain or compensating the landowners. The Supreme Court of California affirmed the ruling of the trial court. *City of Los Angeles* v. *Venice Peninsula Properties*, 31 Cal. 3d 288, 644 P. 2d 792 (1982).

In the Supreme Court of California, petitioner asserted that the Ballona Lagoon had never been tideland, that even if it had been tideland, Mexican law imposed no servitude on the fee interest by reason of that fact, and that even if it were tideland and subject to a servitude under Mexican law, such a servitude was forfeited by the failure of the State to assert it in the federal patent proceedings. The Supreme Court of California ruled against petitioner on all three of these grounds. We granted certiorari, 460 U. S. 1036 (1983), and now reverse that judgment, holding that even if it is assumed that the Ballona Lagoon was part of tidelands subject by Mexican law to the servitude described by the Supreme

Court of California, the State's claim to such a servitude must have been presented in the federal patent proceeding in order to survive the issue of a fee patent.[1]

[1] Respondents argue that the decision below presents simply a question concerning an incident of title, which even though relating to a patent issued under a federal statute raises only a question of state law. They rely on cases such as *Hooker* v. *Los Angeles*, 188 U. S. 314 (1903), *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217 (1910), and *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339 (1909). These cases all held, quite properly in our view, that questions of riparian water rights under patents issued under the 1851 Act did not raise a substantial federal question merely because the conflicting claims were based upon such patents. But the controversy in the present case, unlike those cases, turns on the proper construction of the Act of March 3, 1851. Were the rule otherwise, this Court's decision in *Barker* v. *Harvey*, 181 U. S. 481 (1901), would have been to dismiss the appeal, which was the course taken in *Hooker*, rather than to decide the case on the merits. See also *Beard* v. *Federy*, 3 Wall. 478 (1866). The opinion below clearly recognized as much, for the California Supreme Court wrote that "under the Act of 1851, the federal government succeeded to Mexico's right in the tidelands granted to defendants' predecessors upon annexation of California," 31 Cal. 3d, at 298, 644 P. 2d, at 798, an interest that "was acquired by California upon its admission to statehood," *id.*, at 302, 644 P. 2d, at 801. Thus, our jurisdiction is based on the need to determine whether the provisions of the 1851 Act operate to preclude California from now asserting its public trust easement.

The 1839 grant to the Machados and Talamantes contained a reservation that the grantees may enclose the property "without prejudice to the traversing roads and servitudes *[servidumbres]*." App. 5. According to expert testimony at trial, under Las Siete Partidas, the law in effect at the time of the Mexican grant, this reservation in the Machados' and Talamantes' grant was intended to preserve the rights of the public in the tidelands enclosed by the boundaries of the Rancho Ballona. The California Supreme Court reasoned that this interest was similar to the common-law public trust imposed on tidelands. Petitioner and *amicus* United States argue, however, that this reservation was never intended to create a public trust easement of the magnitude now asserted by California. At most this reservation was inserted in the Mexican grant simply to preserve existing roads and paths for use by the public. See *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 485–486 (1921); *Barker* v. *Harvey*, *supra*; cf. *Jover* v. *Insular Government*, 221 U. S. 623 (1911). While it is beyond cavil that we may take a fresh look at what Mexican law may have been in

Petitioner's title to the lagoon, like all the land in Marina del Rey, dates back to 1839, when the Mexican Governor of California granted to Augustin and Ignacio Machado and Felipe and Tomas Talamantes a property known as the Rancho Ballona.[2] The land comprising the Rancho Ballona became part of the United States following the war between the United States and Mexico, which was formally ended by the Treaty of Guadalupe Hidalgo in 1848. 9 Stat. 922. Under the terms of the Treaty of Guadalupe Hidalgo the United States undertook to protect the property rights of Mexican landowners, Treaty of Guadalupe Hidalgo, Art. VIII, 9 Stat. 929, at the same time settlers were moving into California in large numbers to exploit the mineral wealth and other resources of the new territory. Mexican grants encompassed well over 10 million acres in California and included some of the best land suitable for development. H. R. Rep. No. 1, 33d Cong., 2d Sess., 4–5 (1854). As we wrote long ago:

1839, see *United States* v. *Perot*, 98 U. S. 428, 430 (1879); *Fremont* v. *United States*, 17 How. 542, 556 (1855), we find it unnecessary to determine whether Mexican law imposed such an expansive easement on grants of private property.

[2] The Rancho Ballona occupied an area of approximately 14,000 acres and included a tidelands area of about 2,000 acres within its boundaries. The present-day Ballona Lagoon is virtually all that remains of the former tidelands, with filling and development or natural conditions transforming most of much larger lagoon area into dry land. Although respondent Los Angeles claims that the present controversy involves only what remains of the old lagoon, a fair reading of California law suggests that the State's claimed public trust servitude can be extended over land no longer subject to the tides if the land was tidelands when California became a State. See *City of Long Beach* v. *Mansell*, 3 Cal. 3d 462, 476 P. 2d 423 (1970).

The Mexican grantees acquired title through a formal process that began with a petition to the Mexican Governor of California. Their petition was forwarded to the City Council of Los Angeles, whose committee on vacant lands approved the request. Formal vesting of title took place after the Rancho had been inspected, a Mexican judge had completed "walking the boundaries," App. 213, and the conveyance duly registered. See generally *id.*, at 1–13; *United States* v. *Pico*, 5 Wall. 536, 539 (1867).

> "The country was new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity. The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and settle all private land claims, so that the real estate belonging to individuals could be separated from the public domain." *Peralta* v. *United States*, 3 Wall. 434, 439 (1866).

See also *Botiller* v. *Dominguez*, 130 U. S. 238, 244 (1889).

To fulfill its obligations under the Treaty of Guadalupe Hidalgo and to provide for an orderly settlement of Mexican land claims, Congress passed the Act of March 3, 1851, setting up a comprehensive claims settlement procedure. Under the terms of the Act, a Board of Land Commissioners was established with the power to decide the rights of "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government . . . ." Act of Mar. 3, 1851, § 8, ch. 41, 9 Stat. 632. The Board was to decide the validity of any claim according to "the laws, usages, and customs" of Mexico, § 11, while parties before the Board had the right to appeal to the District Court for a *de novo* determination of their rights, § 9; *Grisar* v. *McDowell*, 6 Wall. 363, 375 (1868), and to appeal to this Court, § 10. Claimants were required to present their claims within two years, however, or have their claims barred. § 13; see *Botiller* v. *Dominguez*, *supra*. The final decree of the Board, or any patent issued under the Act, was also a conclusive adjudication of the rights of the claimant as against the United States, but not against the interests of third parties with superior titles. § 15.

In 1852 the Machados and the Talamantes petitioned the Board for confirmation of their title under the Act. Following a hearing, the petition was granted by the Board, App. 21, and affirmed by the United States District Court on ap-

peal, *id.*, at 22–23. Before a patent could issue, however, a survey of the property had to be approved by the Surveyor General of California. The survey for this purpose was completed in 1858, and although it was approved by the Surveyor General of California, it was rejected upon submission to the General Land Office of the Department of the Interior. *Id.*, at 32–34.

In the confirmation proceedings that followed, the proposed survey was readvertised and interested parties informed of their right to participate in the proceedings.[3] The property owners immediately north of the Rancho Ballona protested the proposed survey of the Rancho Ballona; the Machados and Talamantes, the original grantees, filed affidavits in support of their claim. As a result of these submissions, as well as a consideration of the surveyor's field notes and underlying Mexican documents, the General Land Office withdrew its objection to the proposed ocean boundary. The Secretary of the Interior subsequently approved the survey and in 1873 a patent was issued confirming title in the Rancho Ballona to the original Mexican grantees. *Id.*, at 101–109. Significantly, the federal patent issued to the Machados and Talamantes made no mention of any public trust interest such as the one asserted by California in the present proceedings.

The public trust easement claimed by California in this lawsuit has been interpreted to apply to all lands which were

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[3] It is plain that the State had the right to participate in the patent proceedings leading to confirmation of the Machados' and Talamantes' grant. The State asserts that as a "practice" it did not participate in confirmation proceedings under the 1851 Act. Brief for Respondent California 16, n. 17. In point of fact, however, the State and the city of Los Angeles participated in just such a proceeding involving a rancho near the Rancho Ballona. See *In re Sausal Redundo and Other Cases*, Brief for General Rosecrans and State of California et al., and Resolutions of City Council of Los Angeles, Dec. 24, 1868, found in National Archives, RG 49, California Land Claims, Docket 414. Moreover, before the Mexican grant was confirmed, Congress passed a statute specially conferring a right on all parties claiming an interest in any tract embraced by a published survey to file objections to the survey. Act of July 1, 1864, § 1, ch. 194, 13 Stat. 332.

tidelands at the time California became a State, irrespective of the present character of the land. See *City of Long Beach* v. *Mansell*, 3 Cal. 3d 462, 486–487, 476 P. 2d 423, 440–441 (1970). Through this easement, the State has an overriding power to enter upon the property and possess it, to make physical changes in the property, and to control how the property is used. See *Marks* v. *Whitney*, 6 Cal. 3d 251, 259–260, 491 P. 2d 374, 380–381 (1971); *People* v. *California Fish Co.*, 166 Cal. 576, 596–599, 138 P. 79, 87–89 (1913). Although the landowner retains legal title to the property, he controls little more than the naked fee, for any proposed private use remains subject to the right of the State or any member of the public to assert the State's public trust easement. See *Marks* v. *Whitney*, *supra*.

The question we face is whether a property interest so substantially in derogation of the fee interest patented to petitioner's predecessors can survive the patent proceedings conducted pursuant to the statute implementing the Treaty of Guadalupe Hidalgo. We think it cannot. The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State. *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15–16 (1935). But the Court in *Borax* recognized that a different result would follow if the private lands had been patented under the 1851 Act. *Id.*, at 19. Patents confirmed under the authority of the 1851 Act were issued "pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State." *Id.*, at 21. See also *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977); *Knight* v. *United States Land Assn.*, 142 U. S. 161 (1891).

This fundamental distinction reflects an important aspect of the 1851 Act enacted by Congress. While the 1851 Act was intended to implement this country's obligations under the Treaty of Guadalupe Hidalgo, the 1851 Act also served an overriding purpose of providing repose to land titles that originated with Mexican grants. As the Court noted in *Peralta* v. *United States*, 3 Wall. 434 (1866), the territory in California was undergoing a period of rapid development and exploitation, primarily as a result of the finding of gold at Sutter's Mill in 1848. See generally J. Caughey, California 238–255 (2d ed. 1953). It was essential to determine which lands were private property and which lands were in the public domain in order that interested parties could determine what land was available from the Government. The 1851 Act was intended "to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of this country, in a manner and form that will prevent future controversy." *Fremont* v. *United States*, 17 How. 542, 553–554 (1855); accord, *Thompson* v. *Los Angeles Farming Co.*, 180 U. S. 72, 77 (1901).

California argues that since its public trust servitude is a sovereign right, the interest did not have to be reserved expressly on the federal patent to survive the confirmation proceedings.[4] Patents issued pursuant to the 1851 Act were,

[4] In support of this argument the State cites to *Montana* v. *United States*, 450 U. S. 544 (1981), and *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387 (1892), in support of its proposition that its public trust servitude survived the 1851 Act confirmation proceedings. While *Montana* v. *United States* and *Illinois Central R. Co.* v. *Illinois* support the proposition that alienation of the beds of navigable waters will not be lightly inferred, property underlying navigable waters can be conveyed in recognition of an "international duty." *Montana* v. *United States*, *supra*, at 552. Whether the Ballona Lagoon was navigable under federal law in 1850 is open to speculation. The trial court found only that the present-day lagoon was navigable, App. to Pet. for Cert. A–52, while respondent Los Angeles concedes that the lagoon was not navigable in 1850, Brief for Respondent Los Angeles 29. The obligation of the United States to respect

of course, confirmatory patents that did not expand the title of the original Mexican grantee. *Beard* v. *Federy*, 3 Wall. 478 (1866). But our decisions in a line of cases beginning with *Barker* v. *Harvey*, 181 U. S. 481 (1901), effectively dispose of California's claim that it did not have to assert its interest during the confirmation proceedings. In *Barker* the Court was presented with a claim brought on behalf of certain Mission Indians for a permanent right of occupancy on property derived from grants from Mexico. The Indians' claim to a right of occupancy was derived from a reservation placed on the original Mexican grants permitting the grantees to fence in the property without "interfering with the roads, crossroads and other usages." *Id.*, at 494, 495. The Court rejected the Indians' claim, holding:

> "If these Indians had any claims founded on the action of the Mexican government they abandoned them by not

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the property rights of Mexican citizens was, of course, just such an international obligation, made express by the Treaty of Guadalupe Hidalgo and inherent in the law of nations, see *United States* v. *Moreno*, 1 Wall. 400, 404 (1864); *United States* v. *Fossatt*, 21 How. 445, 448 (1859).

The State also argues that the Court has previously recognized that sovereign interests need not be asserted during proceedings confirming private titles. The State's reliance on *New Orleans* v. *United States*, 10 Pet. 662 (1836), and *Eldridge* v. *Trezevant*, 160 U. S. 452 (1896), in support of its argument is misplaced, however. Neither of these cases involved titles confirmed under the 1851 Act. In *New Orleans* v. *United States*, for example, the Board of Commissioners in that case could only make recommendations to Congress, in contrast to the binding effect of a decree issued by the Board under the 1851 Act. Thus, we held in that case that the city of New Orleans could assert public rights over riverfront property which were previously rejected by the Board of Commissioners. *New Orleans* v. *United States*, *supra*, at 733–734. The decision in *Eldridge* v. *Trezevant*, *supra*, did not even involve a confirmatory patent, but simply the question whether an outright federal grant was exempt from longstanding local law permitting construction of a levee on private property for public safety purposes. While the Court held that the federal patent did not extinguish the servitude, the interest asserted in that case was not a "right of permanent occupancy," *Barker* v. *Harvey*, 181 U. S., at 491, such as that asserted by the State in this case.

> presenting them to the commission for consideration, and they could not, therefore, . . . 'resist successfully any action of the government in disposing of the property.' If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. . . . Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy." *Id.* at 491–492.

The Court followed its holding in *Barker* in a subsequent case presenting a similar question, in which the Indians claimed an aboriginal right of occupancy derived from Spanish and Mexican law that could only be extinguished by some affirmative act of the sovereign. *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472 (1924). Although it was suggested to the Court that Mexican law recognized such an aboriginal right, Brief for Appellant in *United States* v. *Title Ins. & Trust Co.*, O. T. 1923, No. 358, pp. 14–16; cf. *Chouteau* v. *Molony*, 16 How. 203, 229 (1854), the Court applied its decision in *Barker* to hold that because the Indians failed to assert their interest within the timespan established by the 1851 Act, their claimed right of occupancy was barred. The Court declined an invitation to overrule its decision in *Barker* because of the adverse effect of such a decision on land titles, a result that counseled adherence to a settled interpretation. 265 U. S., at 486.

Finally, in *United States* v. *Coronado Beach Co.*, 255 U. S. 472 (1921), the Government argued that even if the landowner had been awarded title to tidelands by reason of a Mexican grant, a condemnation award should be reduced to reflect the interest of the State in the tidelands which it acquired when it entered the Union. The Court expressly rejected the Government's argument, holding that the patent proceedings were conclusive on this issue, and could not be collaterally attacked by the Government. *Id.*, at 487–488. The necessary result of the *Coronado Beach* decision is that even "sovereign" claims such as those raised by the State of California in the present case must, like other claims, be asserted in the patent proceedings or be barred.

These decisions control the outcome of this case. We hold that California cannot at this late date assert its public trust easement over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings taken pursuant to the Act of 1851. The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest, like the Indian claims made in *Barker* and in *United States* v. *Title Ins. & Trust Co.*, must have been presented in the patent proceeding or be barred. Accordingly, the judgment of the Supreme Court of California is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL took no part in the decision of this case.

IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* DELGADO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1271. Argued January 11, 1984—Decided April 17, 1984

Acting pursuant to warrants issued on a showing of probable cause that numerous unidentified illegal aliens were employed at a garment factory, the Immigration and Naturalization Service (INS) conducted two "factory surveys" of the work force in search of illegal aliens. A third factory survey was conducted with the employer's consent at another garment factory. During each survey, which lasted from one to two hours, INS agents positioned themselves near the factory exits, while other agents moved systematically through the factory, approaching employees and, after identifying themselves, asking the employees from one to three questions relating to their citizenship. If an employee gave a credible reply that he was a United States citizen or produced his immigration papers, the agent moved on to another employee. During the survey, employees continued with their work and were free to walk around within the factory. Respondent employees—who were United States citizens or permanent resident aliens, and who had been questioned during the surveys—and their union filed actions, consolidated in Federal District Court, alleging that the factory surveys violated their Fourth Amendment rights, and seeking declaratory and injunctive relief. The District Court granted summary judgment for the INS, but the Court of Appeals reversed, holding that the surveys constituted a seizure of the entire work forces, and that the INS could not question an individual employee unless its agents had a reasonable suspicion that the employee was an illegal alien.

Held: The factory surveys did not result in the seizure of the entire work forces, and the individual questioning of the respondent employees by INS agents concerning their citizenship did not amount to a detention or seizure under the Fourth Amendment. Pp. 215–221.

(a) Interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, such questioning does not result in a detention under the Fourth Amendment. Pp. 216–217.

(b) The entire work forces of the factories were not seized for the duration of the surveys here, even though INS agents were placed near

the exits of the factory sites. The record indicates that the agents' conduct consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory. This conduct should not have given respondents, or any other citizens or aliens lawfully present in the factories, any reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. If mere questioning did not constitute a seizure when it occurred inside the factory, it was no more a seizure when it occurred at the exits. Pp. 217–219.

(c) Since there was no seizure of the work forces by virtue of the method of conducting the surveys, the issue of individual questioning could be presented only if one of the respondent employees had in fact been seized or detained, but their deposition testimony showed that none were. They may only litigate what happened to them, and their description of the encounters with the INS agents showed that the encounters were classic consensual encounters rather than Fourth Amendment seizures. Pp. 219–221.

681 F. 2d 624, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 221. POWELL, J., filed an opinion concurring in the result, *post*, p. 221. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 225.

Deputy Solicitor General Frey argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Elliott Schulder*, and *Patty Merkamp Stemler*.

Henry R. Fenton argued the cause for respondents. With him on the brief were *Gordon K. Hubel* and *Max Zimny*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

In the course of enforcing the immigration laws, petitioner Immigration and Naturalization Service (INS) enters employers' worksites to determine whether any illegal aliens

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *David M. Brodsky*, *Burt Neuborne*, and *Charles S. Sims;* and for the Mexican American Legal Defense and Education Fund, Inc., et al. by *Michael Kantor* and *Alan Diamond*.

may be present as employees. The Court of Appeals for the Ninth Circuit held that the "factory surveys" involved in this case amounted to a seizure of the entire work forces, and further held that the INS could not question individual employees during any of these surveys unless its agents had a reasonable suspicion that the employee to be questioned was an illegal alien. *International Ladies' Garment Workers' Union, AFL–CIO* v. *Sureck*, 681 F. 2d 624 (1982). We conclude that these factory surveys did not result in the seizure of the entire work forces, and that the individual questioning of the respondents in this case by INS agents concerning their citizenship did not amount to a detention or seizure under the Fourth Amendment. Accordingly, we reverse the judgment of the Court of Appeals.

Acting pursuant to two warrants, in January and September 1977, the INS conducted a survey of the work force at Southern California Davis Pleating Co. (Davis Pleating) in search of illegal aliens. The warrants were issued on a showing of probable cause by the INS that numerous illegal aliens were employed at Davis Pleating, although neither of the search warrants identified any particular illegal aliens by name. A third factory survey was conducted with the employer's consent in October 1977, at Mr. Pleat, another garment factory.

At the beginning of the surveys several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfac-

tory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work and were free to walk around within the factory.

Respondents are four employees questioned in one of the three surveys.[1] In 1978 respondents and their union representative, the International Ladies Garment Workers' Union, filed two actions, later consolidated, in the United States District Court for the Central District of California challenging the constitutionality of INS factory surveys and seeking declaratory and injunctive relief. Respondents argued that the factory surveys violated their Fourth Amendment right to be free from unreasonable searches or seizures and the equal protection component of the Due Process Clause of the Fifth Amendment.

The District Court denied class certification and dismissed the union from the action for lack of standing, App. to Pet. for Cert. 58a–60a. In a series of cross-motions for partial summary judgment, the District Court ruled that respondents had no reasonable expectation of privacy in their workplaces which conferred standing on them to challenge entry by the INS pursuant to a warrant or owner's consent. *Id.*, at 49a–52a, 53a–55a, 56a–57a. In its final ruling the District Court addressed respondents' request for injunctive relief directed at preventing the INS from questioning them personally during any future surveys. The District Court, with no material facts in dispute, found that each of the four respondents was asked a question or questions by an INS agent during one of the factory surveys. *Id.*, at 46a. Reasoning from this Court's decision in *Terry* v. *Ohio*, 392 U. S. 1 (1968), that law enforcement officers may ask questions of anyone, the

[1] Respondents Herman Delgado, Ramona Correa, and Francisca Labonte worked at Davis Pleating, while Marie Miramontes, the fourth respondent, was employed by Mr. Pleat. Both Delgado and Correa are United States citizens, while Labonte and Miramontes are permanent resident aliens.

District Court ruled that none of the respondents had been detained under the Fourth Amendment during the factory surveys, either when they were questioned or otherwise. App. to Pet. for Cert. 47a. Accordingly, it granted summary judgment in favor of the INS.[2]

The Court of Appeals reversed. Applying the standard first enunciated by a Member of this Court in *United States* v. *Mendenhall*, 446 U. S. 544 (1980) (opinion of Stewart, J.), the Court of Appeals concluded that the entire work forces were seized for the duration of each survey, which lasted from one to two hours, because the stationing of agents at the doors to the buildings meant that "a reasonable worker 'would have believed that he was not free to leave.'" 681 F. 2d, at 634 (quoting *United States* v. *Anderson*, 663 F. 2d 934, 939 (CA9 1981)). Although the Court of Appeals conceded that the INS had statutory authority to question any alien or person believed to be an alien as to his right to be or remain in the United States, see 66 Stat. 233, 8 U. S. C. § 1357(a)(1), it further held that under the Fourth Amendment individual employees could be questioned only on the basis of a reasonable suspicion that a particular employee being questioned was an alien illegally in the country. 681 F. 2d, at 639–645. A reasonable suspicion or probable cause to believe that a number of illegal aliens were working at a particular factory site was insufficient to justify questioning any individual employee. *Id.*, at 643. Consequently, it also held that the individual questioning of respondents violated the Fourth Amendment because there had been no such reasonable suspicion or probable cause as to any of them.[3]

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[2] The District Court never ruled directly on respondents' Fifth Amendment claim, apparently reasoning that since respondents' Fourth Amendment rights had not been violated, their Fifth Amendment right had also not been violated. The Court of Appeals also never ruled on respondents' Fifth Amendment claim, and we decline to do so.

[3] The Court of Appeals ruled that the District Court did not abuse its discretion in denying class certification. In light of its disposition of respondents' Fourth Amendment claims, the Court of Appeals declined to

We granted certiorari to review the decision of the Court of Appeals, 461 U. S. 904 (1983), because it has serious implications for the enforcement of the immigration laws and presents a conflict with the decision reached by the Third Circuit in *Babula* v. *INS*, 665 F. 2d 293 (1981).

The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976). Given the diversity of encounters between police officers and citizens, however, the Court has been cautious in defining the limits imposed by the Fourth Amendment on encounters between the police and citizens. As we have noted elsewhere: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, *supra*, at 19, n. 16. While applying such a test is relatively straightforward in a situation resembling a traditional arrest, see *Dunaway* v. *New York*, 442 U. S. 200, 212–216 (1979), the protection against unreasonable seizures also extends to "seizures that involve only a brief detention short of traditional arrest." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, *supra*, at 554 (footnote omitted); see *Florida* v. *Royer*, 460 U. S. 491, 502 (1983) (plurality opinion).

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resolve the union's appeal from the District Court's determination that the union lacked standing to raise its members' Fourth Amendment claims. 681 F. 2d, at 645, n. 24.

Although we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in *Royer*, *supra*, plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. In *Royer*, when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were "permissible in themselves." *Id.*, at 501 (plurality opinion); see *id.*, at 523, n. 3 (opinion of REHNQUIST, J.). In contrast, a much different situation prevailed in *Brown* v. *Texas*, 443 U. S. 47 (1979), when two policemen physically detained the defendant to determine his identity, after the defendant refused the officers' request to identify himself. The Court held that absent some reasonable suspicion of misconduct, the detention of the defendant to determine his identity violated the defendant's Fourth Amendment right to be free from an unreasonable seizure. *Id.*, at 52.

What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 231–234 (1973). Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes

some minimal level of objective justification to validate the detention or seizure. *United States* v. *Mendenhall*, 446 U. S., at 554; see *Terry* v. *Ohio*, 392 U. S., at 21.

The Court of Appeals held that "the manner in which the factory surveys were conducted in this case constituted a seizure of the workforce" under the Fourth Amendment. 681 F. 2d, at 634. While the element of surprise and the systematic questioning of individual workers by several INS agents contributed to the court's holding, the pivotal factor in its decision was the stationing of INS agents near the exits of the factory buildings. According to the Court of Appeals, the stationing of agents near the doors meant that "departures were not to be contemplated," and thus, workers were "not free to leave." *Ibid.* In support of the decision below, respondents argue that the INS created an intimidating psychological environment when it intruded unexpectedly into the workplace with such a show of officers.[4] Besides the stationing of agents near the exits, respondents add that the length of the survey and the failure to inform workers they were free to leave resulted in a Fourth Amendment seizure of the entire work force.[5]

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[4] Although the issue was the subject of substantial discussion at oral argument, the INS does not contest that respondents have standing to bring this case. They allege the existence of an ongoing policy which violated the Fourth Amendment and which will be applied to their workplace in the future. Cf. *Allee* v. *Medrano*, 416 U. S. 802 (1974). Part of their argument is clearly based on the INS's detention of illegal aliens found working at the two factories. Respondents, however, can only premise their right to injunctive relief on their individual encounters with INS agents during the factory surveys. See *infra*, at 221.

[5] Contrary to respondents' assertion, it also makes no difference in this case that the encounters took place inside a factory, a location usually not accessible to the public. The INS officers were lawfully present pursuant to consent or a warrant, and other people were in the area during the INS agents' questioning. Thus, the same considerations attending contacts between the police and citizens in public places should apply to the questions presented to the individual respondents here.

We reject the claim that the entire work forces of the two factories were seized for the duration of the surveys when the INS placed agents near the exits of the factory sites. Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers. The record indicates that when these surveys were initiated, the employees were about their ordinary business, operating machinery and performing other job assignments. While the surveys did cause some disruption, including the efforts of some workers to hide, the record also indicates that workers were not prevented by the agents from moving about the factories.

Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned. The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory. This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits.[6]

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[6] In her deposition respondent Miramontes described an incident that occurred during the October factory survey at Mr. Pleat, in which an INS agent stationed by an exit attempted to prevent a worker, presumably an illegal alien, from leaving the premises after the survey started. The worker walked out the door and when an agent tried to stop him, the worker pushed the agent aside and ran away. App. 125–126. An ambiguous, isolated incident such as this fails to provide any basis on which to conclude that respondents have shown an INS policy entitling them to injunctive relief. See *Rizzo* v. *Goode*, 423 U. S. 362 (1976); cf. *Allee* v. *Medrano*, *supra*; *Hague* v. *CIO*, 307 U. S. 496 (1939).

A similar conclusion holds true for all other citizens or aliens lawfully present inside the factory buildings during the surveys. The presence of agents by the exits posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments. Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way. Since most workers could have had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.[7]

The Court of Appeals also held that "detentive questioning" of individuals could be conducted only if INS agents could articulate "objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country." 681 F. 2d, at 638. Under our analysis, however, since there was no seizure of the work forces by virtue of the method of conducting the factory surveys, the only way the issue of individual questioning could be presented would be if one of the named respondents had in fact been seized or detained. Reviewing the deposition testimony of respondents, we conclude that none were.

The questioning of each respondent by INS agents seems to have been nothing more than a brief encounter. None of the three Davis Pleating employees were questioned during the January survey. During the September survey at Davis Pleating, respondent Delgado was discussing the survey with another employee when two INS agents approached him and asked him where he was from and from what city. When Delgado informed them that he came from Mayaguez, Puerto

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[7] Respondents Delgado and Labonte both left the building during the INS survey, Delgado to load a truck and Labonte to observe INS activities outside the building. App. 98, 136. Neither of them stated in their depositions that the INS agents in any way restrained them from leaving the building, or even addressed any questions to them upon leaving.

Rico, the agent made an innocuous observation to his partner and left. App. 94. Respondent Correa's experience in the September survey was similar. Walking from one part of the factory to another, Correa was stopped by an INS agent and asked where she was born. When she replied "Huntington Park, [California]," the agent walked away and Correa continued about her business. *Id.*, at 115. Respondent Labonte, the third Davis Pleating employee, was tapped on the shoulder and asked in Spanish, "Where are your papers?" *Id.*, at 138. Labonte responded that she had her papers and without any further request from the INS agents, showed the papers to the agents, who then left. Finally, respondent Miramontes, the sole Mr. Pleat employee involved in this case, encountered an agent en route from an office to her worksite. Questioned concerning her citizenship, Miramontes replied that she was a resident alien, and on the agent's request, produced her work permit. The agent then left. *Id.*, at 120–121.

Respondents argue that the manner in which the surveys were conducted and the attendant disruption caused by the surveys created a psychological environment which made them reasonably afraid they were not free to leave. Consequently, when respondents were approached by INS agents and questioned concerning their citizenship and right to work, they were effectively detained under the Fourth Amendment, since they reasonably feared that refusing to answer would have resulted in their arrest. But it was obvious from the beginning of the surveys that the INS agents were only questioning people. Persons such as respondents who simply went about their business in the workplace were not detained in any way; nothing more occurred than that a question was put to them. While persons who attempted to flee or evade the agents may eventually have been detained for questioning, see *id.*, at 50, 81–84, 91–93, respondents did not do so and were not in fact detained. The manner in which respondents were questioned, given its obvious purpose, could hardly result in a reasonable fear that respond-

ents were not free to continue working or to move about the factory. Respondents may only litigate what happened to them, and our review of their description of the encounters with the INS agents satisfies us that the encounters were classic consensual encounters rather than Fourth Amendment seizures. See *Florida* v. *Royer*, 460 U. S. 491 (1983); *United States* v. *Mendenhall*, 446 U. S. 544 (1980).

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, concurring.

A trial has not yet been held in this case. The District Court entered summary judgment against respondents, and the Court of Appeals, in reversing, did not remand the case for trial but rather directed the District Court to enter summary judgment for respondents and a permanent injunction against petitioners. As the case comes to us, therefore, we must construe the record most favorably to petitioners, and resolve all issues of fact in their favor. Because I agree that this record is insufficient to establish that there is no genuine issue of fact on the question whether any of the respondents could have reasonably believed that he or she had been detained in some meaningful way, I join the opinion of the Court.

JUSTICE POWELL, concurring in the result.

While the Court's opinion is persuasive, I find the question of whether the factory surveys conducted in this case resulted in any Fourth Amendment "seizures" to be a close one. The question turns on a difficult characterization of fact and law: whether a reasonable person in respondents' position would have believed he was free to refuse to answer the questions put to him by INS officers and leave the factory. I believe that the Court need not decide the question, however, because it is clear that any "seizure" that may have taken place was permissible under the reasoning of our decision in *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976).

In that case, we held that stopping automobiles for brief questioning at permanent traffic checkpoints away from the Mexican border is consistent with the Fourth Amendment and need not be authorized by a warrant.[1] We assumed that the stops constituted "seizures" within the meaning of the Fourth Amendment, see *id.*, at 546, n. 1, 556, but upheld them as reasonable. As in prior cases involving the apprehension of aliens illegally in the United States, we weighed the public interest in the practice at issue against the Fourth Amendment interest of the individual. See *id.*, at 555. Noting the importance of routine checkpoint stops to controlling the flow of illegal aliens into the interior of the country, we found that the Government had a substantial interest in the practice. On the other hand, the intrusion on individual motorists was minimal: the stops were brief, usually involving only a question or two and possibly the production of documents. Moreover, they were public and regularized law enforcement activities vesting limited discretion in officers in the field. Weighing these considerations, we held that the stops and questioning at issue, as well as referrals to a slightly longer secondary inspection, might be made "in the absence of any individualized suspicion" that a particular car contained illegal aliens, *id.*, at 562.

This case is similar. The Government's interest in using factory surveys is as great if not greater. According to an affidavit by the INS's Assistant District Director in Los Angeles contained in the record in this case, the surveys account for one-half to three-quarters of the illegal aliens identified and arrested away from the border every day in the Los Angeles District. App. 47.[2] In that District alone, over

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[1] This case presents no question as to whether a warrant was required for the entry by the INS officers into the plants. As the majority notes, the INS obtained either a warrant or consent from the factory owners before entering the plants to conduct the surveys.

[2] The Solicitor General informs us that the figure in text refers to 1977. For the country as a whole, the INS estimates from its internal records that factory surveys accounted in 1982 for approximately 60% of all illegal

20,000 illegal aliens were arrested in the course of factory surveys in one year. *Id.*, at 44. The surveys in this case resulted in the arrest of between 20% and 50% of the employees at each of the factories.[3]

We have noted before the dimensions of the immigration problem in this country. *E. g.*, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878–879 (1975); *Martinez-Fuerte*, *supra*, at 551–553. Recent estimates of the number of illegal aliens in this country range between 2 and 12 million, although the consensus appears to be that the number at any one time is between 3 and 6 million.[4] One of the main reasons they come—perhaps *the* main reason—is to seek employment. See App. 43; *Martinez-Fuerte*, *supra*, at 551; Select Committee, at 25, 38. Factory surveys strike directly at this cause, enabling the INS with relatively few agents to diminish the incentive for the dangerous passage across the border and to apprehend large numbers of those who come. Clearly, the Government interest in this enforcement technique is enormous.[5]

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aliens apprehended by the INS in nonborder locations. Brief for Petitioners 3–4, and n. 3.

[3] During the course of the the first survey at Davis Pleating, 78 illegal aliens were arrested out of a work force of approximately 300. The second survey nine months later resulted in the arrest of 39 illegal aliens out of about 200 employees. The survey at Mr. Pleat resulted in the arrest of 45 illegal aliens out of approximately 90 employees. App. 51.

[4] House Select Committee on Population, 95th Cong., 2d Sess., Legal and Illegal Immigration to the United States 2, 16–17 (Comm. Print 1978) (hereinafter Select Committee); see also *Brignoni-Ponce*, 422 U. S., at 878 (the INS in 1974 suggested that the number of illegal aliens might be as high as 10 to 12 million).

[5] Despite the vast expenditures by the INS and other agencies to prevent illegal immigration and apprehend aliens illegally in the United States, and despite laws making it a crime for them to be here, our law irrationally continues to permit United States employers to hire them. Many employers actively recruit low-paid illegal immigrant labor, encouraging—with Government tolerance—illegal entry into the United States. See Select Committee, at 25. This incongruity in our immigration statutes is not calculated to increase respect for the rule of law.

The intrusion into the Fourth Amendment interests of the employees, on the other hand, is about the same as it was in *Martinez-Fuerte*. The objective intrusion is actually less: there, cars often were stopped for up to five minutes, while here employees could continue their work as the survey progressed. They were diverted briefly to answer a few questions or to display their registration cards. It is true that the initial entry into the plant in a factory survey is a surprise to the workers, but the obviously authorized character of the operation, the clear purpose of seeking illegal aliens, and the systematic and public nature of the survey serve to minimize any concern or fright on the part of lawful employees. Moreover, the employees' expectation of privacy in the plant setting here, like that in an automobile, certainly is far less than the traditional expectation of privacy in one's residence. Therefore, for the same reasons that we upheld the checkpoint stops in *Martinez-Fuerte* without any individualized suspicion, I would find the factory surveys here to be reasonable.[6]

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[6]The Court in *Martinez-Fuerte* also held that no particularized reason was necessary to refer motorists to the secondary inspection area for a slightly more intrusive "seizure." 428 U. S., at 563–564. Similarly, I would hold in this case that in the context of an overall survey of a factory, no particularized suspicion is needed to justify the choice of those employees who are subjected to the minimal intrusion of the questioning here. The dissent's claim that INS agents have greater discretion to decide whom to question in factory surveys than they do at traffic checkpoints, *post*, at 237–238, neglects the virtually unlimited discretion to refer cars to the secondary inspection area that we approved in *Martinez-Fuerte*.

The dissent also suggests that a warrant requirement for factory surveys, and certain unspecified improvements, would make the surveys constitutional. *Post*, at 239. I note only that the Court in *Martinez-Fuerte* declined to impose a warrant requirement on the location of traffic checkpoints, 428 U. S., at 564–566, and that the respondents here do not argue for such a requirement or for changes in the "duration and manner" of the surveys. I would not address the warrant question until it is fully briefed by both sides.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

As part of its ongoing efforts to enforce the immigration laws, the Immigration and Naturalization Service (INS) conducts "surveys" of those workplaces that it has reason to believe employ large numbers of undocumented aliens who may be subject to deportation. This case presents the question whether the INS's method of carrying out these "factory surveys"[1] violates the rights of the affected factory workers to be secure against unreasonable seizures of one's person as guaranteed by the Fourth Amendment. Answering that question, the Court today holds, first, that the INS surveys involved here did not result in the seizure of the entire factory work force for the complete duration of the surveys, *ante*, at 218–219, and, second, that the individual questioning of respondents by INS agents concerning their citizenship did not constitute seizures within the meaning of the Fourth Amendment, *ante*, at 219–221. Although I generally agree with the Court's first conclusion,[2] I am convinced that a fair application of our prior decisions to the facts of this case

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[1] The enforcement activities of the INS are divided between "border patrol" operations conducted along the border and its functional equivalents and "area control" operations conducted in the interior of the United States. The INS's area control operations are in turn divided into traffic control operations (such as maintaining fixed checkpoints on major highways) and factory surveys of the kind at issue in this case.

[2] It seems to me that the Court correctly finds that there was no single continuing seizure of the entire work force from the moment that the INS agents first secured the factory exits until the completion of the survey. I join the Court's judgment in this respect because it is apparent that in all three factory surveys under review most of the employees were generally free while the survey was being conducted to continue working without interruption and to move about the workplace. Having said that, however, I should emphasize that I find the evidence concerning the conduct of the factorywide survey highly relevant to determining whether the individual respondents were seized. See *infra*, at 229–231.

compels the conclusion that respondents were unreasonably seized by INS agents in the course of these factory surveys.

At first blush, the Court's opinion appears unremarkable. But what is striking about today's decision is its studied air of unreality. Indeed, it is only through a considerable feat of legerdemain that the Court is able to arrive at the conclusion that the respondents were not seized. The success of the Court's sleight of hand turns on the proposition that the interrogations of respondents by the INS were merely brief, "consensual encounters," *ante*, at 221, that posed no threat to respondents' personal security and freedom. The record, however, tells a far different story.

I

Contrary to the Court's suggestion, see *ante*, at 216, we have repeatedly considered whether and, if so, under what circumstances questioning of an individual by law enforcement officers may amount to a seizure within the meaning of the Fourth Amendment. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1 (1968); *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Adams* v. *Williams*, 407 U. S. 143 (1972); *Brown* v. *Texas*, 443 U. S. 47 (1979); *United States* v. *Mendenhall*, 446 U. S. 544 (1980); *Florida* v. *Royer*, 460 U. S. 491 (1983). Of course, as these decisions recognize, the question does not admit of any simple answer. The difficulty springs from the inherent tension between our commitment to safeguarding the precious, and all too fragile, right to go about one's business free from unwarranted government interference, and our recognition that the police must be allowed some latitude in gathering information from those individuals who are willing to cooperate. Given these difficulties, it is perhaps understandable that our efforts to strike an appropriate balance have not produced uniform results. Nevertheless, the outline of what appears to be the appropriate inquiry has been traced over the years with some clarity.

The Court launched its examination of this issue in *Terry* v. *Ohio*, *supra*, by explaining that "the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. *It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.*" *Id.*, at 16 (emphasis added). Such a seizure, the Court noted, may be evidenced by either "physical force or show of authority" indicating that the individual's liberty has been restrained. *Id.*, at 19, n. 16. The essential teaching of the Court's decision in *Terry*—that an individual's right to personal security and freedom must be respected even in encounters with the police that fall short of full arrest—has been consistently reaffirmed. In *Davis* v. *Mississippi*, 394 U. S., at 726–727, for example, the Court confirmed that investigatory detentions implicate the protections of the Fourth Amendment and further explained that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Id.*, at 727, n. 6. Similarly, in *Brown* v. *Texas*, *supra*, we overturned a conviction for refusing to stop and identify oneself to police, because, in making the stop, the police lacked any "reasonable suspicion, based on objective facts, that the individual [was] involved in criminal activity." *Id.*, at 51. The animating principle underlying this unanimous decision was that the Fourth Amendment protects an individual's personal security and privacy from unreasonable interference by the police, even when that interference amounts to no more than a brief stop and questioning concerning one's identity.

Although it was joined at the time by only one other Member of this Court, Part II–A of Justice Stewart's opinion in *United States* v. *Mendenhall*, *supra*, offered a helpful, preliminary distillation of the lessons of these cases. Noting

first that "as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy," Justice Stewart explained that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554. The opinion also suggested that such circumstances might include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Ibid.*

A majority of the Court has since adopted that formula as the appropriate standard for determining when inquiries made by the police cross the boundary separating merely consensual encounters from forcible stops to investigate a suspected crime. See *Florida* v. *Royer*, 460 U. S., at 502, (plurality opinion); *id.*, at 511–512 (BRENNAN, J., concurring in result); *id.*, at 514 (BLACKMUN, J., dissenting). This rule properly looks not to the subjective impressions of the person questioned but rather to the objective characteristics of the encounter which may suggest whether or not a reasonable person would believe that he remained free during the course of the questioning to disregard the questions and walk away. See 3 W. LaFave, Search and Seizure § 9.2, p. 52 (1978). The governing principles that should guide us in this difficult area were summarized in the *Royer* plurality opinion:

> "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, con-

vert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.*" 460 U. S., at 497–498 (citations omitted) (emphasis added).

Applying these principles to the facts of this case, I have no difficulty concluding that respondents were seized within the meaning of the Fourth Amendment when they were accosted by the INS agents and questioned concerning their right to remain in the United States. Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a "show of authority" of sufficient size and force to overbear the will of any reasonable person. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the INS agents' questions. The Court's efforts to avoid this conclusion are rooted more in fantasy than in the record of this case. The Court goes astray, in my view, chiefly because it insists upon considering each interrogation in isolation as if respondents had been questioned by the INS in a setting similar to an encounter between a single police officer and a lone passerby that might occur on a street corner. Obviously, once the Court begins with such an unrealistic view of the facts, it is only a short step to the equally fanciful conclusion that respondents acted voluntarily when they stopped and answered the agents' questions.

The surrounding circumstances in this case are far different from an isolated encounter between the police and a passerby on the street. Each of the respondents testified at length about the widespread disturbance among the workers

that was sparked by the INS surveys and the intimidating atmosphere created by the INS's investigative tactics. First, as the respondents explained, the surveys were carried out by surprise by relatively large numbers of agents, generally from 15 to 25, who moved systematically through the rows of workers who were seated at their work stations. See App. 77–78, 81–85, 102–103, 122–123. Second, as the INS agents discovered persons whom they suspected of being illegal aliens, they would handcuff these persons and lead them away to waiting vans outside the factory. See *id.*, at 88, 140–141. Third, all of the factory exits were conspicuously guarded by INS agents, stationed there to prevent anyone from leaving while the survey was being conducted. See *id.*, at 48, 82, 125–126, 144–145, 158. Finally, as the INS agents moved through the rows of workers, they would show their badges and direct pointed questions at the workers. In light of these circumstances, it is simply fantastic to conclude that a reasonable person could ignore all that was occurring throughout the factory and, when the INS agents reached him, have the temerity to believe that he was at liberty to refuse to answer their questions and walk away.

Indeed, the experiences recounted by respondents clearly demonstrate that they did not feel free either to ignore the INS agents or to refuse to answer the questions posed to them. For example, respondent Delgado, a naturalized American citizen, explained that he was standing near his work station when two INS agents approached him, identified themselves as immigration officers, showed him their badges, and asked him to state where he was born. *Id.*, at 95. Delgado, of course, had seen all that was going on around him up to that point and naturally he responded. As a final reminder of who controlled the situation, one INS agent remarked as they were leaving Delgado that they would be coming back to check him out again because he spoke English too well. *Id.*, at 94. Respondent Miramontes described her encounter with the INS in similar terms: "He

told me he was from Immigration, so when I showed him the [work permit] papers I saw his badge. *If I hadn't* [seen his badge], *I wouldn't have shown them to him.*" *Id.*, at 121 (emphasis added). She further testified that she was frightened during this interview because "normally you get nervous when you see everybody is scared, everybody is nervous." *Ibid.* Respondent Labontes testified that while she was sitting at her machine an immigration officer came up to her from behind, tapped her on the left shoulder and asked "Where are your papers?" Explaining her response to this demand, she testified: "I turned, *and at the same time I didn't wish to identify myself.* When I saw [the INS agents], I said, 'Yes, yes, I have my papers.'" *Id.*, at 138 (emphasis added).

In sum, it is clear from this testimony that respondents felt constrained to answer the questions posed by the INS agents, even though they did not wish to do so. That such a feeling of constraint was reasonable should be beyond question in light of the surrounding circumstances. Indeed, the respondents' testimony paints a frightening picture of people subjected to wholesale interrogation under conditions designed not to respect personal security and privacy, but rather to elicit prompt answers from completely intimidated workers. Nothing could be clearer than that these tactics amounted to seizures of respondents under the Fourth Amendment.[3]

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[3] Although respondents insist that the circumstances of these interrogations were sufficiently coercive to constitute a "seizure" under the Fourth Amendment, they do not contend that these interviews were conducted under conditions that might be labeled "custodial"; they do not argue, therefore, that the questioning by INS agents posed any threat to the privilege against self-incrimination protected by the Fifth Amendment. Cf. *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Accordingly, it is not necessary to consider whether INS agents should be required to warn respondents of the possible incriminating consequences of providing answers to the agents' questions.

II

The Court's eagerness to conclude that these interrogations did not represent seizures is to some extent understandable, of course, because such a conclusion permits the Court to avoid the imposing task of justifying these seizures on the basis of reasonable, objective criteria as required by the Fourth Amendment.

The reasonableness requirement of the Fourth Amendment applies to all seizures of the person, including those that involve only a brief detention short of traditional arrest. But because the intrusion upon an individual's personal security and privacy is limited in cases of this sort, we have explained that brief detentions may be justified on "facts that do not amount to the probable cause required for an arrest." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975). Nevertheless, our prior decisions also make clear that investigatory stops of the kind at issue here "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States* v. *Cortez*, 449 U. S. 411, 417 (1981). As the Court stated in *Terry*, the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." 392 U. S., at 21, n. 18. Repeatedly, we have insisted that police may not detain and interrogate an individual unless they have reasonable grounds for suspecting that the person is involved in some unlawful activity. In *United States* v. *Brignoni-Ponce*, *supra*, for instance, the Court held that "[Border Patrol] officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.*, at 884. See also *Michigan* v. *Summers*, 452 U. S. 692, 699–700 (1981); *Ybarra* v. *Illinois*, 444 U. S. 85, 92–93 (1979); *Brown* v. *Texas*, 443 U. S., at 51–52; *Dela-*

ware v. *Prouse*, 440 U. S. 648, 661 (1979); *Adams* v. *Williams*, 407 U. S., at 146–149; *Davis* v. *Mississippi*, 394 U. S., at 726–728; *Terry* v. *Ohio*, 392 U. S., at 16–19. This requirement of particularized suspicion provides the chief protection of lawful citizens against unwarranted governmental interference with their personal security and privacy.

In this case, the individual seizures of respondents by the INS agents clearly were neither "based on specific, objective facts indicating that society's legitimate interests require[d] the seizure," nor "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, *supra*, at 51. It is undisputed that the vast majority of the undocumented aliens discovered in the surveyed factories had illegally immigrated from Mexico. Nevertheless, the INS agents involved in this case apparently were instructed, in the words of the INS Assistant District Director in charge of the operations, to interrogate "virtually all persons employed by a company." App. 49. See also *id.*, at 77, 85–86, 151–152, 155. Consequently, all workers, irrespective of whether they were American citizens, permanent resident aliens, or deportable aliens, were subjected to questioning by INS agents concerning their right to remain in the country. By their own admission, the INS agents did not selectively question persons in these surveys on the basis of any reasonable suspicion that the persons were illegal aliens. See *id.*, at 55, 155. That the INS policy is so indiscriminate should not be surprising, however, since many of the employees in the surveyed factories who are lawful residents of the United States may have been born in Mexico, have a Latin appearance, or speak Spanish while at work. See *id.*, at 57, 73. What this means, of course, is that the many lawful workers who constitute the clear majority at the surveyed workplaces are subjected to surprise questioning under intimidating circumstances by INS agents who have no reasonable basis for suspecting that they have

done anything wrong. To say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the words of the Fourth Amendment.

Furthermore, even if the INS agents had pursued a firm policy of stopping and interrogating only those persons whom they reasonably suspected of being *aliens*, they would still have failed, given the particular circumstances of this case, to safeguard adequately the rights secured by the Fourth Amendment. The first and in my view insurmountable problem with such a policy is that, viewed realistically, it poses such grave problems of execution that in practice it affords virtually no protection to lawful American citizens working in these factories. This is so because, as the Court recognized in *Brignoni-Ponce*, *supra*, at 886, there is no reliable way to distinguish with a reasonable degree of accuracy between native-born and naturalized citizens of Mexican ancestry on the one hand, and aliens of Mexican ancestry on the other.[4] See also Developments, Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1374–1375 (1983). Indeed, the record in this case clearly demonstrates this danger, since respondents Correa and Delgado, although both American citizens, were subjected to questioning during the INS surveys.

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[4] As we explained in *Brignoni-Ponce:* "Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." 422 U. S. at 886.

Indeed, the proposition that INS agents, even those who have considerable experience in the field, will be able fairly and accurately to distinguish between Spanish-speaking persons of Mexican ancestry who are either native-born or naturalized citizens, and Spanish-speaking persons of Mexican ancestry who are aliens is both implausible and subject to discriminatory abuse. The protection of fundamental constitutional rights should not depend upon such unconstrained administrative discretion, for, as we have often observed, "[w]hen . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown* v. *Texas*, 443 U. S. 47, 52 (1979).

Moreover, the mere fact that a person is believed to be an alien provides no immediate grounds for suspecting any illegal activity. Congress, of course, possesses broad power to regulate the admission and exclusion of aliens, see *Kleindeinst* v. *Mandel*, 408 U. S. 753, 766 (1972); *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977), and resident aliens surely may be required to register with the INS and to carry proper identification, see 8 U. S. C. §§ 1302, 1304(e). Nonetheless, as we held in *Brignoni-Ponce*, 422 U. S., at 883–884, when the Executive Branch seeks to enforce such congressional policies, it may not employ enforcement techniques that threaten the constitutional rights of American citizens. In contexts such as these factory surveys, where it is virtually impossible to distinguish fairly between citizens and aliens, the threat to vital civil rights of American citizens would soon become intolerable if we simply permitted the INS to question persons solely on account of suspected alienage. Cf. *id.*, at 884–886. Therefore, in order to protect both American citizens and lawful resident aliens, who are also protected by the Fourth Amendment, see *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973), the INS must tailor its enforcement efforts to focus only on those workers who are reasonably suspected of being illegal aliens.[5]

[5] Of course, as the Government points out, see Brief for Petitioners 35–38, § 287(a)(1) of the Immigration and Nationality Act provides that INS officers may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 66 Stat. 233, 8 U. S. C. § 1357(a)(1). We have held, however, that broad statutory authority of this kind does not license the INS to employ unconstitutional enforcement methods. *Almeida-Sanchez* v. *United States*, 413 U. S., at 272–273. Because of that concern, the Court in *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), expressly left open the question whether INS officers "may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." *Id.*, at 884, n. 9. In my view, given the particular constitutional dangers posed by the INS's present method of carrying out factory surveys, the exercise of the authority granted by § 287(a)(1) must be limited to interrogations of only those persons reasonably believed to be in the country illegally.

Relying upon *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976), however, JUSTICE POWELL would hold that the interrogation of respondents represented a "reasonable" seizure under the Fourth Amendment, even though the INS agents lacked any particularized suspicion of illegal alienage to support the questioning, *ante*, at 224. In my view, reliance on that decision is misplaced. In *Martinez-Fuerte*, the Court held that when the intrusion upon protected privacy interests is extremely limited, the INS, in order to serve the pressing governmental interest in immigration enforcement, may briefly detain travelers at fixed checkpoints for questioning solely on the basis of "apparent Mexican ancestry." 428 U. S., at 563. In so holding, the Court was careful to distinguish its earlier decision in *Brignoni-Ponce*, *supra*, which held that Border Patrol agents conducting roving patrols may not stop and question motorists solely on the basis of apparent Mexican ancestry, and may instead make such stops only when their observations lead them "reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country." *Id.*, at 881. The "crucial distinction" between the roving patrols and the fixed checkpoints, as the Court later observed in *Delaware* v. *Prouse*, 440 U. S., at 656, was "the lesser intrusion upon the motorist's Fourth Amendment interests" caused by the checkpoint operations. Thus, as the Court explained in *Martinez-Fuerte:* "This objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." 428 U. S., at 558.[6]

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[6] Indeed, in *Martinez-Fuerte*, the Court repeatedly emphasized that, in contrast to the roving patrol stops, the fixed checkpoint operations are less likely to frighten motorists. This was so because "[m]otorists using these highways are not taken by surprise as they know . . . the location of the

The limited departure from *Terry*'s general requirement of particularized suspicion permitted in *Martinez-Fuerte* turned, therefore, largely on the fact that the intrusion upon motorists resulting from the checkpoint operations was extremely modest. In this case, by contrast, there are no equivalent guarantees that the privacy of lawful workers will not be substantially invaded by the factory surveys or that the workers will not be frightened by the INS tactics. Indeed, the opposite is true. First, unlike the fixed checkpoints that were upheld in *Martinez-Fuerte* in part because their location was known to motorists in advance, the INS factory surveys are sprung upon unsuspecting workers completely by surprise. Respondents testified that the sudden arrival of large numbers of INS agents created widespread fear and anxiety among most workers. See App. 89, 107, 116, 120–121, 129–130. Respondent Miramontes, for instance, explained that she was afraid during the surveys "[b]ecause if I leave and they think I don't have no papers and they shoot me or something. They see me leaving and they think I'm guilty." *Id.*, at 127.[7] In *Martinez-Fuerte*, there was absolutely no evidence of widespread fear and anxiety similar to that adduced in this case.

Second, the degree of unfettered discretionary judgment exercised by the individual INS agents during the factory surveys is considerably greater than in the fixed checkpoint operations. The power of individual INS agents to decide who they will stop and question and who they will pass over contributes significantly to the feeling of uncertainty and

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checkpoints and will not be stopped elsewhere," and because the operations "both appear to and actually involve less discretionary enforcement activity." 428 U. S., at 559.

[7] See also United States Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 90–91 (1980) (noting that "[t]estimony received by the Commission indicates that . . . INS area control operations do cause confusion and pandemonium among all factory employees, thereby disrupting a factory's operations and decreasing production").

anxiety of the workers. See App. 86, 90, 129–130. Unlike the fixed checkpoint operation, there can be no reliable sense among the affected workers that the survey will be conducted in an orderly and predictable manner. Third, although the workplace obviously is not as private as the home, it is at the same time not without an element of privacy that is greater than in an automobile. All motorists expect that while on the highway they are subject to general police surveillance as part of the regular and expectable enforcement of traffic laws. For the average employee, however, the workplace encloses a small, recognizable community that is a locus of friendships, gossip, common effort, and shared experience. While at work, therefore, the average employee will not have the same sense of anonymity that is felt when one is driving on the public highways; instead, an employee will be known by co-workers and will recognize other employees as his or her fellows. This experience, common enough among all who work, forms the basis for a legitimate, albeit modest, expectation of privacy that cannot be indiscriminately invaded by government agents. See *Mancusi* v. *DeForte*, 392 U. S. 364, 368–369 (1968) (employee has reasonable expectation of privacy in office space shared with other workers). The mere fact that the employer has consented to the entry of the INS onto his property does not mean that the workers' expectation of privacy evaporates.

Finally, there is no historical precedent for these kinds of surveys that would make them expectable or predictable. As the Court noted in *Martinez-Fuerte*, *supra*, at 560–561, n. 14, road checkpoints are supported to some extent by a long history of acceptance that diminishes substantially the concern and fear that such practices would elicit in the average motorist. But factory surveys of the kind conducted by the INS are wholly unprecedented, and their novelty can therefore be expected to engender a high degree of resentment and anxiety. In sum, although the governmental interest is obviously as substantial here as it was in *Martinez-*

Fuerte, the degree of intrusion upon the privacy rights of lawful workers is significantly greater. Accordingly, the quantum of suspicion required to justify such an intrusion must be correspondingly greater.

In my view, therefore, the only acceptable alternatives that would adequately safeguard Fourth Amendment values in this context are for the INS either (a) to adopt a firm policy of stopping and questioning only those workers who are reasonably suspected of being illegal aliens, or (b) to develop a factory survey program that is predictably and reliably less intrusive than the current scheme under review. The first alternative would satisfy the requirement of particularized suspicion enunciated in *Terry*—a principle that must control here because the specific conditions that permitted exception to that requirement in *Martinez-Fuerte* are simply not present. The second alternative would seek to redesign the factory survey techniques used by the INS in order to bring them more closely into line with the characteristics found in *Martinez-Fuerte*. Such a scheme might require the INS, before conducting a survey of all workers in a particular plant, to secure an administrative warrant based upon a showing that reasonable grounds exist for believing that a substantial number of workers employed at the factory are undocumented aliens subject to deportation, and that there are no practical alternatives to conducting such a survey. Cf. *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). In addition, the surveys could be further tailored in duration and manner so as to be substantially less intrusive.

III

No one doubts that the presence of large numbers of undocumented aliens in this country creates law enforcement problems of titanic proportions for the INS. Nor does anyone question that this agency must be afforded considerable latitude in meeting its delegated enforcement responsibilities. I am afraid, however, that the Court has become so

mesmerized by the magnitude of the problem that it has too easily allowed Fourth Amendment freedoms to be sacrificed. Before we discard all efforts to respect the commands of the Fourth Amendment in this troubling area, however, it is worth remembering that the difficulties faced by the INS today are partly of our own making.

The INS methods under review in this case are, in my view, more the product of expedience than of prudent law enforcement policy. The Immigration and Nationality Act establishes a quota-based system for regulating the admission of immigrants to this country which is designed to operate primarily at our borders. See 8 U. S. C. §§ 1151–1153, 1221–1225. See generally Developments, 96 Harv. L. Rev., at 1334–1369. With respect to Mexican immigration, however, this system has almost completely broken down. This breakdown is due in part, of course, to the considerable practical problems of patroling a 2,000-mile border; it is, however, also the result of our failure to commit sufficient resources to the border patrol effort. See Administration's Proposals on Immigration and Refugee Policy: Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 6 (1981) (statement of Attorney General Smith); see also Developments, 96 Harv. L. Rev., at 1439. Furthermore, the Act expressly exempts American businesses that employ undocumented aliens from all criminal sanctions, 8 U. S. C. § 1324(a), thereby adding to the already powerful incentives for aliens to cross our borders illegally in search of employment.[8]

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[8]The enormous law enforcement problems resulting from this combination of practical difficulties in patrolling this border and the incentives for illegal aliens to secure employment have been noted by the Congress, see Hearings on Oversight of the Immigration and Naturalization Service before the Subcommittee on Immigration, Citizenship and International

In the face of these facts, it seems anomalous to insist that the INS must now be permitted virtually unconstrained discretion to conduct wide-ranging searches for undocumented aliens at otherwise lawful places of employment in the *interior* of the United States. What this position amounts to, I submit, is an admission that since we have allowed border enforcement to collapse and since we are unwilling to require American employers to share any of the blame, we must, as a matter of expediency, visit all of the burdens of this jury-rigged enforcement scheme on the privacy interests of completely lawful citizens and resident aliens who are subjected to these factory raids solely because they happen to work alongside some undocumented aliens.[9] The average American, as we have long recognized, see *Carroll* v. *United States*, 267 U. S. 132, 154 (1925), expects some interference with his or her liberty when seeking to cross the Nation's borders, but until today's decision no one would ever have expected the same treatment while lawfully at work in the country's interior. Because the conditions which spawned such expedient solutions are in no sense the fault of these

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Law of the House Committee on the Judiciary, 95th Cong., 2d Sess. (1978); and also by a Select Commission on Immigration and Refugee Policy, see United States Immigration Policy and the National Interest, Final Report of the Select Commission on Immigration and Refugee Policy 46, 61–62, 72–73 (1981).

[9] In this regard, the views expressed in JUSTICE WHITE's concurring opinion in *United States* v. *Ortiz*, 422 U. S. 891, 915 (1975), are particularly pertinent:

"The entire [immigration enforcement] system, however, has been notably unsuccessful in deterring or stemming this heavy flow [of illegal immigration]; and its costs, including added burdens on the courts, have been substantial. Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts."

lawful workers, the Court, as the guardian of their constitutional rights, should attend to this problem with greater sensitivity before simply pronouncing the Fourth Amendment a dead letter in the context of immigration enforcement. The answer to these problems, I suggest, does not lie in abandoning our commitment to protecting the cherished rights secured by the Fourth Amendment, but rather may be found by reexamining our immigration policy.

I dissent.

TRANS WORLD AIRLINES, INC. *v.* FRANKLIN MINT CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82–1186. Argued November 30, 1983—Decided April 17, 1984*

The Warsaw Convention (Convention), an international air carriage treaty that the United States ratified in 1934, sets a limit on an air carrier's liability for lost cargo at 250 gold French francs per kilogram, which sum may be converted into any national currency. In 1978, Congress repealed the Par Value Modification Act (PVMA), which set an "official" price of gold in the United States. Nevertheless, the Civil Aeronautics Board (CAB) continued to sanction the use of the last official price of gold as a conversion factor. As a result, a $9.07-per-pound limit of liability remained codified in the CAB regulations governing international air carriers' tariffs filed under the Federal Aviation Act of 1958. Franklin Mint Corp. brought suit in Federal District Court against Trans World Airlines (TWA) to recover damages in the amount of $250,000 for the loss in 1979 of packages containing numismatic materials delivered to TWA for transport from Philadelphia to London. The parties having stipulated that TWA was responsible for the loss, the only dispute was the extent of liability. The District Court ruled that under the Convention the liability was limited to $6,475.98, a figure derived from the weight of the packages, the Convention's liability limit, and the last official price of gold in the United States. The Court of Appeals affirmed, but also ruled that 60 days from the issuance of the mandate the Convention's liability limit would be unenforceable in the United States, since enforcement of the Convention required a factor for converting the liability limit into dollars and there was no United States legislation specifying a factor to be used by United States courts.

Held:

1. The Convention's cargo liability limit remains enforceable in United States courts, and was not rendered unenforceable by the 1978 repeal of the PVMA. Pp. 251–253.

(a) Legislative silence is not sufficient to abrogate a treaty. Here, neither the legislative histories of the various PVMA's, the history of the repealing Act, nor the repealing Act itself, make any reference to the

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*Together with No. 82–1465, *Franklin Mint Corp. et al.* v. *Trans World Airlines, Inc.*, also on certiorari to the same court.

Convention, the repeal being unrelated to the Convention and intended to give formal effect to a new international monetary system. Since the Convention is a self-executing treaty, no domestic legislation is required to give it the force of law in the United States. And neither Congress nor the Executive Branch has given the required notice to other parties to the Convention that the United States planned to abrogate the Convention. To the contrary the Executive Branch continues to maintain that the Convention's liability limit remains enforceable in the United States. Pp. 251–253.

(b) When the parties to a treaty continue to assert its vitality, a private person may not invoke the doctrine of *rebus sic stantibus* to assert that a treaty ceases to be binding when there has been a substantial change in conditions since its promulgation. Accordingly, the erosion of the international gold standard and the 1978 repeal of the PVMA cannot be construed as terminating or repudiating the United States' duty to abide by the Convention's liability limit. P. 253.

2. A $9.07-per-pound liability limit is not inconsistent with domestic law or with the Convention itself. Pp. 254–260.

(a) It is clear that such limit does not contravene any domestic legislation, absent any suggestion by Congress when it repealed the PVMA that the CAB should thereafter use a conversion factor different from the official price of gold or that either of the political branches expected or intended the repealing Act to affect the dollar equivalent of the Convention's liability limit. P. 255.

(b) Tying the Convention's liability limit to today's gold market would fail to effect any purpose of the Convention's framers, and would be inconsistent with well-established international practice. A fixed $9.07-per-pound liability limit represents a choice not inconsistent with the Convention's purposes of setting some limits on a carrier's liability, of setting a stable, predictable, and internationally uniform limit that would encourage the growth of the air carrier industry, and of linking the Convention to a constant *value* that would keep step with the average value of cargo carried and so remain equitable for carriers and transport users alike. Pp. 255–260.

690 F. 2d 303, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 261.

John N. Romans argued the cause for Trans World Airlines, Inc. With him on the briefs was *Robert S. Lipton.*

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* in support of Trans World Airlines, Inc. With him on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller,* and *Michael F. Hertz.*

John R. Foster argued the cause and filed a brief for Franklin Mint Corp. et al.†

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented in this litigation is whether an air carrier's declared liability limit of $9.07 per pound of cargo is inconsistent with the "Warsaw Convention"[1] (Convention), an international air carriage treaty that the United States has ratified. As a threshold matter we must determine whether the 1978 repeal of legislation setting an "official" price of gold in the United States renders the Convention's gold-based liability limit unenforceable in this country. We conclude that the 1978 legislation was not intended to affect the enforceability of the Convention in the United States, and that a $9.07-per-pound liability limit is not inconsistent with the Convention.

I

In 1974 the Civil Aeronautics Board (CAB) informed international air carriers doing business in the United States that the minimum acceptable carrier liability limit for lost cargo would thenceforth be $9.07 per pound. Trans World Airlines, Inc. (TWA), has complied with the CAB order since that time. On March 23, 1979, Franklin Mint Corp. (Frank-

†*Alden D. Halford* filed a brief for Boehringer Mannheim Diagnostics, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed for Marc Hammerschlag et al. by *Marc S. Moller;* for the Air Transport Association of America by *James E. Landry* and *George S. Lapham, Jr.;* and for the International Air Transport Association by *Randal R. Craft, Jr.,* and *Peter Hoenig.*

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934), reprinted in note following 49 U. S. C. § 1502.

lin Mint) delivered four packages of numismatic materials with a total weight of 714 pounds to TWA for transportation from Philadelphia to London. Franklin Mint made no special declaration of value at the time of delivery.[2] The packages were subsequently lost. Franklin Mint brought suit in United States District Court to recover damages in the amount of $250,000. The parties stipulated that TWA was responsible for the loss of the packages. The only dispute concerns the extent of TWA's liability.

The District Court ruled that under the Convention TWA's liability was limited to $6,475.98, a figure derived from the weight of the packages, the liability limit set out in the Convention, and the last official price of gold in the United States. The Court of Appeals for the Second Circuit affirmed the judgment, but "rul[ed]" that 60 days from the issuance of the mandate the Convention's liability limit would be unenforceable in the United States. 690 F. 2d 303 (1982).

In a petition for certiorari to this Court TWA challenged the Court of Appeals' declaration that the Convention's liability limit is prospectively unenforceable. In a cross-petition, Franklin Mint contended that the Court of Appeals' actual holding should have been retrospective as well. We granted both petitions, 462 U. S. 1118 (1983). We now conclude that the Convention's cargo liability limit remains enforceable in United States courts and that the CAB-sanctioned $9.07-per-pound liability limit is not inconsistent with the Convention. Accordingly, we affirm the judgment of the Court of Appeals but reject its declaration that the Convention is prospectively unenforceable.

II

The Convention was drafted at international conferences in Paris in 1925, and in Warsaw in 1929. The United States

[2] Had such a declaration been made, and an additional fee paid, Franklin Mint would have been able to recover in an amount not exceeding the declared value. See Convention, Art. 22(2), note following 49 U. S. C. § 1502.

became a signatory in 1934. More than 120 nations now adhere to it. The Convention creates internationally uniform rules governing the air carriage of passengers, baggage, and cargo. Under Article 18 carriers are presumptively liable for the loss of cargo. Article 22 sets a limit on carrier liability:

> "(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .
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> . . . . .
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> "(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures." Reprinted (in English translation) in note following 49 U. S. C. § 1502.

In the United States the task of converting the Convention's liability limit into "any national currency" falls within rulemaking authority which was, for many years including those at issue here, delegated to the CAB under the Federal Aviation Act of 1958 (FAA), 49 U. S. C. § 1301 *et seq.*[3] International air carriers are required to file tariffs with the CAB specifying "in terms of lawful money of the United States" the rates and conditions of their services, including the cargo liability limit that they claim.[4] The Act forbids any carrier to charge a "greater or less or different com-

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[3] With respect to foreign air transportation FAA powers are now exercised by the Department of Transportation in consultation with the Department of State. 49 U. S. C. §§ 1551(b)(1)(B) and (b)(2). For simplicity this opinion will continue to refer only to the CAB.

[4] See 49 U. S. C. § 1373(a); cf. 14 CFR §§ 221.38(a)(2), 221.38(j) (1983).

pensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs . . . ."[5] The CAB, for its part, is empowered to reject any tariff that is inconsistent with the FAA or CAB regulations. 49 U. S. C. § 1373(a). CAB powers are to be exercised "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . . ." 49 U. S. C. § 1502.

During the first 44 years of the United States' adherence to the Convention there existed an "official" price of gold in the United States, and the CAB's task of supervising carrier compliance with the Convention's liability limit was correspondingly simple. The United States Gold Standard Act of 1900 set the value of the dollar at $20.67 per troy ounce of gold.[6] On January 31, 1934, nine months before the United States ratified the Convention, President Roosevelt increased the official domestic price of gold to $35 per ounce.[7] In 1945 the United States accepted membership in the International Monetary Fund (IMF) and so undertook to maintain a "par value" for the dollar and to buy and sell gold at the official price in exchange for balances of dollars officially held by other IMF nations.[8] For almost 40 years the $35-per-ounce price of gold was used to derive from the Convention's

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[5] 49 U. S. C. § 1373(b)(1). CAB regulations require each carrier to notify air transport users of liability limits. "The notice shall be clearly and conspicuously included on or attached to all of [the carrier's] rate sheets and airwaybills." 14 CFR § 205.8 (1983).

[6] See Ch. 41, § 1, 31 Stat. 45 (exchange rate stated in terms of grains of gold per dollar).

[7] Presidential Proclamation No. 2072, 48 Stat. 1730, pursuant to the Gold Reserve Act of 1934, 48 Stat. 337.

[8] The domestic enabling legislation was the Bretton Woods Agreements Act, 59 Stat. 512. See Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, 2 U. N. T. S. 39, T. I. A. S. No. 1501 (1945).

Article 22(2) a cargo liability limit of $7.50 per pound. See, *e. g.*, 14 CFR § 221.176 (1972).

When the central banks of most Western nations instituted a "two-tier" gold standard in 1968 the gold-based international monetary system began to collapse. Thereafter, official gold transactions were conducted at the official price, and private transactions at the floating, free market price. App. 21. In August 1971 the United States suspended convertibility of foreign official holdings of dollars into gold. In December 1971 and then again in February 1973 the official exchange rate of the dollar against gold was increased. These changes were approved by Congress in the Par Value Modification Act, passed in early 1972 (increasing the official price to $38 per ounce[9]) and in its 1973 reenactment (setting a $42.22-per-ounce price[10]). Each time, the CAB followed suit by directing carriers to increase the dollar-based liability limits in their tariffs accordingly, first to $8.16 per pound,[11] then to $9.07 per pound.[12]

In 1975 the member nations of the IMF formulated a plan, known as the Jamaica Accords, to eliminate gold as the basis of the international monetary system.[13] Effective April 1, 1978, the "Special Drawing Right" (SDR) was to become the sole reserve asset that IMF nations would use in their mutual dealings. The SDR was defined as the average value of a defined basket of IMF member currencies.[14] In 1976 Con-

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[9] Par Value Modification Act, Pub. L. 92–268, § 2, 86 Stat. 116.

[10] Par Value Modification Act, Pub. L. 93–110, § 1, 87 Stat. 352.

[11] CAB Order 72–6–7, 37 Fed. Reg. 11384 (1973), implemented (for checked passenger baggage) in 14 CFR § 221.176 (1973).

[12] CAB Order 74–1–16, App. 54, 39 Fed. Reg. 1526 (1974), implemented (for checked passenger baggage) in 14 CFR § 221.176 (1975).

[13] Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, [1976–1977] 29 U. S. T. 2203, T. I. A. S. No. 8937.

[14] The SDR was originally created by the IMF nations in 1969. It was then valued at one thirty-fifth of an ounce of gold, or one 1969 dollar. See First Amendment of the Articles of Agreement of the International Mone-

gress passed legislation to implement the new IMF agreement,[15] repealing the Par Value Modification Act effective April 1, 1978.

As these developments unfolded, the Convention signatories met in Montreal in September 1975. In No. 4 of the "Montreal Protocols,"[16] the delegates proposed to substitute 17 SDR's per kilogram for the 250 French gold francs per kilogram in Article 22 of the Convention. Although the United States supported this change, and signed Protocol No. 4,[17] the Senate has not yet consented to its ratification.[18]

The erosion and final demise of the gold standard, coupled with the United States' failure to ratify Montreal Protocol No. 4, left the CAB with the difficult task of supervising carrier compliance with the Convention's liability limits without up-to-date guidance from Congress. Although the market price of gold began to diverge from the official price in 1969, the CAB continued to track the official price in Orders converting the Convention's liability limit into dollars. Under CAB Order 74–1–16, promulgated in 1974, "the minimum acceptable figur[e] in United States dollars for liability limits

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tary Fund, May 31, 1968, [1969] 20 U. S. T. 2775, T. I. A. S. No. 6748. However there is no longer any fixed correspondence between the SDR and gold; the SDR is defined as a specified basket of Western currencies.

[15] Bretton Woods Agreements Act of 1976, Pub. L. 94–564, § 6, 90 Stat. 2660.

[16] Montreal Protocol No. 4, done Sept. 25, 1975, reprinted in A. Lowenfeld, Aviation Law, Documents Supplement 991, 996 (2d ed. 1981). Convention signatories who do not belong to the IMF determine for themselves how the liability limit will be converted into their national currencies. *Ibid.*

[17] See Lowenfeld, *supra*, § 6.51, at 7–171.

[18] On November 17, 1981, the Senate Committee on Foreign Relations reported in favor of consenting to ratification. But on March 8, 1983, by a vote of 50 to 42 in favor of ratification, the Senate failed to reach the two-thirds majority required for consent. The matter remains on the Senate calendar. See S. Exec. Rep. No. 97–45 (1981); 129 Cong. Rec. S2270, S2279 (daily ed. Mar. 8, 1983); S. Exec. Rep. No. 98–1 (1983).

applicable to 'international transportation' and 'international carriage' . . . [is $] 9.07 [per pound of cargo]."[19]

Since 1978 the CAB has actively reviewed this $9.07-per-pound liability limit.[20] As of 1979, however, the CAB continued to sanction the use of the last official price of gold—$42.22 per ounce—as a conversion factor. A CAB Order published on August 14, 1978, restated the CAB's position.[21] The $9.07-per-pound limit remained codified in CAB regulations, see 14 CFR § 221.176 (1979), and CAB Order 74–1–16 was still in force. TWA, like other international carriers, remained subject to Order 74–1–16.

III

The most important issue raised by the parties is whether the 1978 repeal of the Par Value Modification Act rendered the Convention's cargo liability limit unenforceable in the United States. The Court of Appeals so declared, reasoning that (i) enforcement of the Convention requires a factor for converting the liability limit into dollars and (ii) there is no United States legislation specifying a factor to be used by United States courts. We do not accept this analysis.

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[19] App. 56–57; 39 Fed. Reg. 1526 (1974). TWA is included in the Order's appendix that lists the carriers at which the Order is directed. *Id.*, at 1527.

[20] Three internal agency memoranda have addressed the problem. J. Golden, Director, Bureau of Compliance and Consumer Protection, CAB, Memorandum (May 20, 1981), App. 33 (urging retention of the $42.22 conversion rate until the CAB and the Departments of Transportation and State have agreed on a new rate); P. Kennedy, Chief, Policy Development Division, Bureau of Consumer Protection, CAB, Memorandum (Mar. 18, 1980), *id.*, at 42 (urging adoption of the free market price of gold as the conversion factor); J. Gaynes, Attorney, Legal Division, Bureau of International Aviation, CAB, Memorandum (Apr. 18, 1980), *id.*, at 60 (opposing the Kennedy memorandum recommendation).

[21] CAB Order 78–8–10, 43 Fed. Reg. 35971, 35972 (1978) (liability limit of $20 per kilogram).

There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U. S. 102, 120 (1933). See also *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 690 (1979); *Menominee Tribe of Indians* v. *United States*, 391 U. S. 404, 412–413 (1968); *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U. S. 138, 160 (1934). Legislative silence is not sufficient to abrogate a treaty. *Weinberger* v. *Rossi*, 456 U. S. 25, 32 (1982). Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention. The repeal was unrelated to the Convention; it was intended to give formal effect to a new international monetary system that had in fact evolved almost a decade earlier.

Second, the Convention is a self-executing treaty. Though the Convention permits individual signatories to convert liability limits into national currencies by legislation or otherwise, no domestic legislation is required to give the Convention the force of law in the United States. The repeal of a purely domestic piece of legislation should accordingly not be read as an implicit abrogation of any part of it. See generally *Bacardi Corp. of America* v. *Domenech*, 311 U. S. 150, 161–163 (1940).

Third, Article 39 of the Convention requires a signatory that wishes to withdraw from the Convention to provide other signatories with six months' notice, formally communicated through the Government of Poland.[22] The repeal of the

[22] Note following 49 U. S. C. § 1502. The United States has, in fact, followed this procedure once before. On November 15, 1965, the United States delivered a formal notice of denunciation of the Convention to the

Par Value Modification Act had a sufficient lead time, but Congress and the Executive Branch took no steps to notify other signatories that the United States planned to abrogate the Convention. To the contrary, the Executive Branch continues to maintain that the Convention's liability limit remains enforceable in the United States. Brief for United States as *Amicus Curiae*. In these circumstances we are unwilling to impute to the political branches an intent to abrogate a treaty without following appropriate procedures set out in the Convention itself. See The Federalist No. 64, pp. 436–437 (J. Cooke ed. 1961) (J. Jay).

Franklin Mint suggests that a treaty ceases to be binding when there has been a substantial change in conditions since its promulgation.[23] A treaty is in the nature of a contract between nations. The doctrine of *rebus sic stantibus* does recognize that a nation that is party to a treaty might conceivably invoke changed circumstances as an excuse for terminating its obligations under the treaty.[24] But when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf.

For these reasons the erosion of the international gold standard and the 1978 repeal of the Par Value Modification Act cannot be construed as terminating or repudiating the United States' duty to abide by the Convention's cargo liability limit. We conclude that the limit remains enforceable in United States courts.

Polish Peoples Republic. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 546–552 (1967). The notice was later withdrawn.

[23] See Restatement (Second) of Foreign Relations Law of the United States § 153, and Comment *c* (1965).

[24] However, Article 39(2) of the Convention expressly permits a Convention signatory to withdraw by giving timely notice. Plainly, a party to a treaty of voluntary adhesion can have no need for the doctrine of *rebus sic stantibus*, except insofar as it might wish to avoid the notice requirement.

IV

The Court of Appeals correctly recognized that the Convention's liability limit must be converted into dollars. This requirement derives not from the Convention itself—the Convention merely permits such a conversion—but from the tariff requirements of § 403(a) of the FAA.[25] 49 U. S. C. § 1373(a).

In 1979, when Franklin Mint's cargo was lost, TWA's tariffs set the carrier's cargo liability limit at $9.07 per pound. This tariff had been filed with and accepted by the CAB pursuant to § 403(a), and was squarely consistent with CAB Order 74–1–16. The $9.07-per-pound limit thus represented an Executive Branch determination, made pursuant to properly delegated authority, of the appropriate rate for converting the Convention's liability limits into United States dollars. We are bound to uphold that determination unless we find it to be contrary to law established by domestic legislation or by the Convention itself.[26]

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[25] In this connection the Court of Appeals stated:

"[In repealing the Par Value Modification Act] Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts." 690 F. 2d 303, 311 (CA2 1982) (footnote omitted).

In our view Congress has not abandoned any "unit of conversion specified by the Convention"—the Convention specifies liability limits in terms of gold francs and provides no unit of conversion whatsoever. To the contrary, the Convention invites signatories to make the conversion into national currencies for themselves. In the United States the CAB has been delegated the power to make the conversion, and has exercised the power most recently in Order 74–1–16. We are not called upon to "[s]ubstitut[e] a new term," but merely to determine whether the CAB's Order is inconsistent with the Convention. That determination does not engage the "political question" doctrine.

[26] The dissent apparently has no difficulty accepting that while Congress selected the conversion rate between gold and the dollar "[o]ur practice was consistent with the Convention," see *post*, at 277, n. 6, even though

It is clear, first, that the CAB's choice of a cargo liability limit of $9.07 per pound does not contravene any domestic legislation. When an official price of gold was set by statute the CAB did, of course, use that price to translate the Convention's gold-based liability limit into dollars. But when Congress repealed the Par Value Modification Act it did not suggest that the CAB should thereafter use a different conversion factor. Indeed, there is no hint that either of the political branches expected or intended that Act to affect the dollar equivalent of the Convention's liability limit.

Whether the CAB's choice of a $9.07-per-pound limit is compatible with the Convention itself is more debatable. The Convention included liability limits, and expressed them in terms of gold, to effect several different and to some extent contradictory purposes. Our task of construing those purposes is, however, made considerably easier by the 50 years of consistent international and domestic practices under the Convention. For the reasons stated below we conclude that tying the Convention's liability limit to today's gold market would fail to effect any purpose of the Convention's framers, and would be inconsistent with well-established international

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the conversion rate selected bore no relation whatsoever to the dollar price of gold on the free market, see nn. 35, 37, *infra*. The dissent does not explain why the CAB, whose powers are exercised pursuant to express congressional delegation, was disqualified from setting a similar conversion rate one year after Congress stopped doing so.

Article 22(4) of the Convention expressly permits each signatory nation to convert the Convention's liability limits into any national currency, but provides no conversion rates for doing so. In this country, 49 U. S. C. § 1373(a) requires such a conversion into dollars. The CAB has been delegated authority under which it may determine the appropriate conversion rate, and it has exercised that authority. Thus, for the extremely narrow purpose of converting the Convention's liability limits into dollars Congress has indeed "delegated its authority over the currency to the CAB." See *post*, at 278, n. 6. We may overrule the CAB's action only if we conclude that it is inconsistent with the purposes of the Convention or with domestic law.

practice, acquiesced in by the Convention's signatories over the past 50 years. A fixed $9.07-per-pound liability limit therefore represents a choice by the CAB sufficiently consistent with the Convention's purposes.

The Convention's first and most obvious purpose was to set some limit on a carrier's liability for lost cargo. Any conversion factor will have this effect; in this regard a $9.07-per-pound liability limit is as reasonable as one based on SDR's or the free market price of gold.

The Convention's second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry. To this end the Convention's framers chose an international, not a parochial, standard, free from the control of any one country.[27] The CAB's choice of a $9.07-per-pound liability limit is certainly a stable and predictable one on which carriers can rely. We recognize however that, in the long term, effectuation of the Convention's objective of *international* uniformity might require periodic adjustment by the CAB of the dollar-based limit to account both for the dollar's changing value relative to other Western currencies and, if necessary, for changes in the conversion rates adopted by other Convention signatories. Since 1978, however, no substantial changes of either type have occurred.

Despite the demise of the gold standard, the $9.07-per-pound liability limit retained since 1978 has represented a reasonably stable figure when converted into other Western currencies. This is easily established by reference to the SDR, which is the new, nonparochial, internationally recognized standard of conversion. On March 31, 1978, for ex-

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[27] See generally Heller, The Value of the Gold Franc—A Different Point of View, 6 J. Mar. L. & Com. 73, 94–95 (1974); Asser, Golden Limitations of Liability in International Transport Conventions and the Currency Crisis, 5 J. Mar. L. & Com. 645, 664 (1974); Lowenfeld & Mendelsohn, *supra* n. 22, at 499; H. Drion, Limitation of Liabilities in International Air Law 183 (1954); Excerpt From Warsaw Convention Conference Minutes, October 4–12, 1929, reprinted at App. 161–164.

ample, one SDR was worth $1.23667; on March 23, 1979, $1.28626.[28] At all times since 1978 a carrier that chose to set its liability limit at 17 SDR's per kilogram as suggested by Montreal Protocol No. 4 would have arrived at a liability limit in dollars close to $9 per pound.[29]

The CAB's $9.07-per-pound liability limit also appears to have been a reasonable interim choice for keeping the Convention's liability limit as enforced in the United States in line with limits enforced by other signatories. As of December 31, 1975, 15 nations[30] had signed Montreal Protocol No. 4, suggesting their intent to set a liability limit of 17 SDR's per kilogram; other nations have chosen to continue using the last official price of gold for converting the Convention's cargo liability limit into national currencies.[31] Insofar as has been

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[28] See IMF Survey 125 (Apr. 17, 1978); IMF Survey 114 (Apr. 9, 1979).

[29] See S. Exec. Rep. No. 98–1, p. 42 (1983); IMF, International Financial Statistics, Yearbook 521 (1983).

The CAB has in fact accepted airline tariffs in which liability limits are based on SDR's instead of the fixed $9.07 figure. See, *e. g.*, Passenger Rules, Tariff No. PR–3 (CAB No. 55), Rule 25(D)(1)(a)(ii) (Mar. 30, 1983); CAB Order 81–3–143 (Application of British Caledonian Airways Limited (Mar. 24, 1981).

[30] FitzGerald, The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air, 42 J. Air Law & Comm. 273, 277, n. 12 (1976).

[31] SDR's have been adopted as the basis for converting the Convention limits into national currencies in Canada (Currency and Exchange Act: Carriage By Air Act Gold Franc Conversion Regulations, Jan. 13, 1983, 117 Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983)) (reprinted in App. to Brief for Petitioner TWA, at BA36); Italy (Law No. 84, Mar. 26, 1983, 90 Gaz. Uff. (Apr. 1, 1983)) (English translation at App. to Brief for Petitioner TWA, at BA37); the Republic of South Africa (Carriage by Air Act, No. 17 of 1946, as amended by No. 5 of 1964 and No. 81 of 1979, Stat. Rep. S. Afr. (Issue No. 13) 15, implemented by Dept. of Transport Notice R2031 (Sept. 14, 1979)) (reprinted in App. to Brief for Petitioner TWA, at BA39); Sweden (Carrier by Air Act (1957:297), ch. 9, § 22 (as amended Mar. 30, 1978)) (reprinted at App. 67); and Great Britain (Stat. Inst. 1980, No. 281) (reprinted at App. 70).

In other countries the courts have taken the initiative in adopting the SDR as the new unit of conversion. See, *e. g.*, *Kislinger* v. *Austrian*

possible in the unsettled circumstances since 1975, the CAB's choice of a $9.07-per-pound limit has thus furthered the Convention's intent to set an internationally uniform liability limit.

We recognize that this inquiry into the dollar's value relative to other currencies would have been unnecessary if the CAB had chosen to adopt the market price of gold for converting the Convention's liability limits into dollars. Since gold is freely traded on an international market its price always provides a unique and internationally uniform conversion rate. But reliance on the gold market would entirely fail to provide a stable unit of conversion on which carriers could rely. To pick one extreme example, between January and April 1980 gold ranged from about $490 to $850 per ounce. App. 24. Far from providing predictability and stability, tying the Convention to the gold market would force every carrier and every air transport user to become a speculator in gold, exposed to the sudden and unpredictable swings in the price of that commodity. The CAB has correctly recognized that this is not at all what the Convention's framers had in mind. The 1978 decision by many of the Convention's signatories to exit from the gold market cannot sensibly be construed as a decision to compel every air carrier and air transport user to enter it.

A third purpose of the Convention's gold-based limit may have been to link the Convention to a constant *value*, that

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Airtransport, No. 1 R 145/83 (Commercial Court of Appeals of Vienna, Austria, June 21, 1983) (English translation in App. to Brief for Petitioner TWA, at BA12); *Rendezvous-Boutique-Parfumerie Friedrich und Albine Breitinger GmbH* v. *Austrian Airlines*, No. 14 R 11/83 (Court of Appeals of Linz, Austria, June 17, 1983) (English translation in App. to Brief for Petitioner TWA, at BA22).

At least one court has relied instead on the last official price of gold. See *Costell* v. *Iberia, Lineas Aereas de Espana, S. A.*, No. 255 (Court of Appeal of Valencia, Spain, Oct. 16, 1981) (English translation in App. to Brief for Petitioner TWA, at BA6).

would keep step with the average value of cargo carried and so remain equitable for carriers and transport users alike.[32] We recognize that in an inflationary economy a fixed, dollar-based liability limit may fail in the long term to achieve that purpose. Nonetheless, for the reasons that follow, we cannot fault the CAB's decision to adhere, in the six years since 1978, to a constant $9.07-per-pound liability limit.

The Convention's framers viewed the treaty as one "drawn for a few years," not for "one or two centuries."[33] That it has in fact been adhered to for over half a century is a tribute not only to the framers' skills but to the signatories' manifest willingness to accept a flexible implementation of the Convention's terms. The indisputable fact is that between 1934 and 1978 the signatories, by common if unwritten consent, allowed the value of the liability limit as measured by the free market price of both gold and other commodities to decline substantially, even while the official price of gold was formally maintained.[34] We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence. See *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–295 (1933); *Day* v. *Trans World Airlines, Inc.*, 528 F. 2d 31, 35–36 (CA2 1975), cert. denied, 429 U. S. 890 (1976); Restatement (Second) of Foreign Relations Law of the United States § 147(1)(f) (1965); 2 C. Hyde, International Law 72 (1922). In determining whether the Executive Branch's domestic implementation of the Convention is consistent with

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[32] See references cited in n. 27, *supra*.

[33] Excerpt From Warsaw Convention Conference Minutes, October 4–12, 1929, reprinted at App. 162 (remark of Mr. Rippert (France)).

[34] For a hypothetical 44-pound lost suitcase the liability limit was $330 in 1934, $359 in 1972, and $400 in 1974. In terms of purchasing power, $330 in 1934 were equivalent to $1,031 in 1972 and $1,215 in 1974. *Id.*, at 48. Clearly, the $9.07-per-pound liability limit does not represent the same value that was in effect when the United States adhered to the Convention.

the Convention's terms, our task is to construe a "contract" among nations. The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored.

As of March 31, 1978, $9.07 per pound of cargo therefore represented a "correct" conversion of the Convention's liability limit into dollars.[35] Though the purchasing power of the dollar has declined somewhat since then, the $9.07-per-pound liability limit, viewed in light of international practice, cannot be declared inconsistent with the purposes of the Convention and the shared understanding of its signatories.

Moreover, tying the Convention's liability limit to the free market price of gold would no longer serve to maintain a constant value of carriers' liability. Since 1978 gold has been only "a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure . . . ."[36] A liability limit tied to the gold market might be convenient for a dispatcher of gold bullion, but such a limit would simply force other air transport users and carriers to become unwilling speculators in the gold market. Whatever other purposes they may have had, the Convention's framers and signatories did not intend to adopt or agree to a liability limit that is fluid, uncertain, and altogether inconvenient.[37] The Convention was intended to reduce, not to increase, the economic uncertainties of air transportation.

V

The political branches, which hold the authority to repudiate the Warsaw Convention, have given no indication that

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[35] On that date the official price of gold remained at $42.22 per ounce; the free market price of gold was about $182 per ounce. See The Wall Street Journal, Apr. 3, 1978, p. 29, col. 1.

[36] Lowenfeld, *supra* n. 17, § 6.51, at 7–169.

[37] It is noteworthy that in the decade between 1968 and 1978 the free market price of gold rose as high as $200 per ounce, App. 24, yet the $42.22 official price of gold was uniformly accepted during that period as appropriate for converting the Convention's liability limit into dollars.

they wish to do so. Accordingly, the Convention's cargo liability limit remains enforceable in the United States.

Article 22(4) of the Convention permits conversion of the liability limit into "any national currency." In the United States the authority to make that conversion has been delegated by Congress to the Executive Branch. The courts are bound to respect that arrangement unless the properly delegated authority is exercised in a manner inconsistent with domestic or international law. We conclude that the CAB's decision to continue using a $42.22 per ounce of gold conversion rate after the repeal of the Par Value Modification Act was consistent with domestic law and with the Convention itself, construed in light of its purposes, the understanding of its signatories, and its international implementation since 1929.

We reject the Court of Appeals' declaration that the Convention is prospectively unenforceable; the judgment of the Court of Appeals affirming the judgment of the District Court is

Affirmed.

JUSTICE STEVENS, dissenting.

This litigation involves the interpretation of Article 22 of the Warsaw Convention. The plain language of that Article, quoted *ante*, at 247, requires that the liability limits be determined by reference to the value of "gold at the standard of fineness of nine hundred thousandths" and then converted into our "national currency in round figures."

The Court states that the Warsaw Convention's liability limitation remains enforceable in United States courts, but that is not what the Court holds. The Court holds that the liability limitation agreed upon by the Convention is *not* enforceable in United States courts. Rather, a liability limitation set by Trans World Airlines, and accepted by the Civil Aeronautics Board, is held to be enforceable in United States courts, because that limitation is deemed to correspond more closely to the Convention's "purposes" than the limitation

actually selected by the Convention itself. Thus, instead of enforcing the Convention's liability limitation, the Court has rewritten it.

I

A treaty is essentially a contract between or among sovereign nations. See *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675 (1979). General rules of construction apply to international agreements. See *Ware* v. *Hylton*, 3 Dall. 199, 240–241 (1796) (opinion of Chase, J.). As with any written document, there "is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion . . . ." *The Five Per Cent. Discount Cases*, 243 U. S. 97, 106 (1917). International agreements, like "other contracts, . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting," *Rocca* v. *Thompson*, 223 U. S. 317, 331–332 (1912); see also *Factor* v. *Laubenheimer*, 290 U. S. 276, 295 (1933), and should be interpreted according to the "received acceptation of the terms in which they are expressed." *United States* v. *D'Auterive*, 10 How. 609, 623 (1851).

The great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters. The frame of reference in interpreting treaties is naturally international, and not domestic. Accordingly, the language of the law of nations is always to be consulted in the interpretation of treaties. *The Pizarro*, 2 Wheat. 227, 246 (1817). See also *Santovincenzo* v. *Egan*, 284 U. S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations'") (citation omit-

ted)); *Society for the Propagation of the Gospel in Foreign Parts* v. *New-Haven*, 8 Wheat. 464, 490 (1823). Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'être* of treaties, and hence to the rules of construction applicable to them. *Geofroy* v. *Riggs*, 133 U. S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended"); see also *Tucker* v. *Alexandroff*, 183 U. S. 424, 437 (1902).

Finally, but most fundamentally, a treaty is positive law. Justice Story's words concerning the judicial role in enforcing treaties are strikingly relevant to the issue facing us today:

> "In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.
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> "In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the

extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms as with substance." *The Amiable Isabella*, 6 Wheat. 1, 71–73 (1821).

II

Two years after Charles Lindbergh captured the world's imagination by piloting the Spirit of St. Louis from New York to Paris, delegates from two dozen nations met in Warsaw and drafted an international agreement to encourage the establishment of a secure international civil aviation industry. The Warsaw Convention provided a uniform system of documentation for international flights, and, more significantly, a uniform limitation on international carriers' liability to passengers and shippers. International uniformity, naturally, was the touchstone of the Convention. See Preamble of Convention, note following 49 U. S. C. § 1502.

Air transportation was then viewed as dangerous. The liability limitation was deemed necessary in order to enable air carriers "to attract capital that might otherwise be

scared away by the fear of a single catastrophic accident." Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 499 (1967).[1]

In settling on a particular figure for a liability limitation, the delegates at Warsaw first had to agree upon a common standard of value. They did so in unambiguous terms: the standard of value was *gold* of a stated fineness. Art. 22 (4). The liability limitation for cargo was set at 250 units of fine gold weighing 65½ milligrams per unit. Arts. 22(2), 22(4).[2] The delegates chose an international standard of value—a standard which would be the same in Paris as it would be in New York.

The Convention, while using gold as a standard of value, recognized that all nations did not use it as a medium of ex-

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[1] These fears were epitomized by the crash of the Hindenberg in 1937, though the Warsaw Convention's liability limitation could not save the dirigible—then a significant mode of international air transportation—from rapid extinction. See generally L. Ege, Balloons and Airships 176–221 (1973); D. Robinson, Giants in the Sky 250–315 (1973).

The liability limitation, it may be noted, was not limited to damages arising from special risks of an aircraft crash, nor did it fully protect carriers from those special risks. With respect to parties contracting with air carriers to ship goods, the Convention wrote with a broad brush: limiting liability as well for the kind of damage to goods that would be as likely to occur in any mode of transportation—such as the loss of a single item of cargo in connection with a safe flight. On the other hand, the Convention provided air carriers with no special protection whatsoever vis-à-vis third parties who might be injured by air crashes.

[2] These units, it so happened, corresponded to the French franc as defined by a 1928 French statute. It was thus convenient to call them francs, and the Convention did so. That French statute, however, could have been repealed the day after the delegates adjourned their meeting, and it would not have affected the liability limitation. For the delegates had selected as the standard of value a commodity with a value independent of any one nation's control; indeed, a commodity perceived to have "intrinsic" value—a commodity individuals had valued before there were nations, and would value whether or not national governments made it an official medium of exchange.

change. Therefore, payment in specie was not required or anticipated by the Convention. Rather, the sum of gold set forth in the Convention could be converted into national currencies in round figures. Art. 22(4). All that making the conversion would entail is knowledge of a fact: the amount of that national currency that would exchange for the specified sum of gold.

The unsuitability of relying upon a national currency as a standard of value was demonstrated as a point of actual fact at the outset of the Convention's deliberations on the liability limitation. The draft proposal prepared prior to the Warsaw proceedings by the Comité International Technique d'Experts Juridique Aériens—the functional equivalent of a bill reported to the floor of a legislative assembly by a committee—suggested a limitation of 100 gold francs. Prior to the Convention, however, the franc had been fluctuating in value. France had suspended the convertibility of its currency into gold since the Great War, but returned to a convertible, devalued franc in 1928. The first order of business at the Warsaw proceedings concerning the liability limitation, therefore, was to convert the liability limits contained in the draft proposal, expressed in gold francs defined by a law of August 5, 1914, to the new stabilized French franc defined by the law of June 25, 1928, to be 65.5 milligrams of fine gold. This was a simple matter, for the standard of value of the two statutes was the same—gold—and there was a 1-to-5 ratio between the former gold franc and the new French franc. Since the French currency had stabilized, and since the law of June 25, 1928, defined the French franc in terms of gold, the French proposed that the Convention could eliminate the phrase "the values hereabove are gold values" from the draft proposal. App. 159.

The Swiss delegate submitted a proposal corresponding to the International Railroad Convention for the calculation of values. He stated:

"Naturally, when we prepared our text, the French franc was variable, it has been stabilized since. But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law. For this reason, in Switzerland, we have preferred to stick to the gold standard, *which is the same in all countries, since there is but one quality of gold.*

"We would not be opposed to refer to the French franc, but to the gold French franc, that is to say, based on a weight of gold at such and such one thousandth.

"Naturally, one can say 'French franc' but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn *the essence of this provision. We must base ourselves on an international value*, and we have taken the [gold] dollar. Let one take the gold French franc, it's all the same to me, *but let's take a gold value* . . . as a basis of calculation, be it American or French." *Id.*, at 161–162 (emphasis supplied).

The French delegate resisted the Swiss proposal, pointing out that the particular formula proposed by the Swiss delegate was based on the definition of the 1914 gold franc, and then stating:

"If this Convention of air law is to be applied during one or two centuries, I would perhaps share the fears of [the Swiss delegate], but it's a question of stabilization which was done in practically every country, for a Convention which is drawn for a few years, and I believe that when you will have fixed the present French franc, you will add nothing in saying 'gold franc.' What fear can you have? It is evident that the definition will correspond to the present franc." *Id.*, at 162.

The delegate from Great Britain inquired what would happen if the French franc were to be revalued again. The

French delegate responded that the Convention would apply to the French franc as defined in the 1928 statute. The Swiss delegate then stated no objection to using the French franc, but objected to referring to the French statute, and proposed: "insert in our international convention the same formula as that which you have in France and we accept it." *Id.*, at 163. The French delegate relented, and the Convention agreed to the proposal.

Once an international standard of value had been agreed to, the remaining order of business was to select the quantitative limitation on liability in units of that standard. A liability limitation of 500 new French francs for cargo was contained in the draft proposal. The French, however, proposed a limit of 100 new French francs per kilogram. The French delegate argued that the draft proposal's limit was too high, based upon air carriers' representations that the 100 franc figure represented the actual value of cargo, on the average. That is, the air carriers divided the declared value of cargo by the number of kilograms of cargo for the year 1928, which yielded a figure of approximately 130 francs per kilogram. *Id.*, at 160. The German delegate argued that the French figure was far too low, and proposed a figure of 250 francs, which was ultimately agreed upon.

A gold clause such as that contained in the Convention was common in treaties, see, *e. g.*, Article 262 of The Treaty of Versailles; Article 214 of The Treaty of St. Germain, and Article 197 of the Treaty of Trianon, and other international agreements. The very year the Convention was drafted, a major controversy on the world financial scene was resolved respecting gold clauses which were not drawn as artfully as that contained in the Convention. The Permanent Court of International Justice, in *Payment of Various Serbian Loans Issued in France*, 2 Hudson W. C. 340 (1929), and *Payment in Gold of Brazilian Federal Loans Issued in France*, 2 Hudson W. C. 402 (1929) *(Serbian and Brazilian Bond Cases)*

(July 12, 1929), held that simple references to the gold franc in certain international obligations were intended to represent a gold standard of value, 2 Hudson W. C., at 365. The court continued:

> "As this standard of value was adopted by the Parties, it is not admissible to assert that the standard should not govern the payments because the depreciation in French currency was not foreseen, or, as it is insisted, could not be foreseen at the time the contracts were made. *The question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection.* To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard [of weight and fineness].
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> "The conclusion at which the Court has thus arrived is not affected by the fact that, for more or less extended periods gold specie in francs or a franc at gold parity was not quoted on the money market, as was the case at the time when the loans were issued; for the value can always be fixed either by comparison with the exchange rates of currency of a country in which gold coin is actually in circulation, *or, should this not be possible, by comparison with the price of gold bullion.* Once the gold value is fixed, it is its equivalent in money in circulation which constitutes the amount which is payable . . . ." *Id.*, at 366–367 (emphasis supplied).
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> "[To construe the bonds otherwise], in substance, would eliminate the word 'gold' from the bonds. The contract of the Parties cannot be treated in such a manner. When the Brazilian Government promised to pay 'gold francs', the reference to a well-known standard of value cannot be considered as inserted merely for literary effect, or as a routine expression without significance.

The Court is called upon to construe the promise, not to ignore it.

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". . . It was depreciation in value that was the object of the safeguard, not in this or that particular currency, and it was evidently for this reason that the reference was made to the well-known stability of gold value." *Id.*, at 422–423 (emphasis supplied).

This language is not only significant in terms of the light that it casts on the law of nations and the delegates' contemporaneous intention, but it is also, quite simply, good law. The dissent argued that the intention of the parties was simply not clear enough from the use of the term gold franc, observing it "was possible, for instance, to stipulate, and this is frequently done, that the payments must be effected in gold francs of the same weight and standard as that of the franc in circulation at the time in France . . . ." *Id.*, at 431 (Bustamante, J., dissenting). This, of course, is what the Convention did. Indeed, at the insistence of the Swiss delegate, the Convention went even further, and eliminated the reference to French law altogether. Moreover, the gold clause did not depend on signatory nations adhering to a gold standard. Indeed, such clauses were used in contemplation of a nation going off the gold standard as a method of describing and measuring payment with the intention of guarding against fluctuations in the value of a domestic currency. *Feist* v. *Société Intercommunale Belge D'Électricité*, [1934] A. C. 161, 171–173.

The intention of the Convention simply could not be more manifest. The plain language of the Convention, the deliberations of the delegates, and the contemporary law of nations leave no question as to the the intent of the gold clause: "Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold. *Norman* v. *Baltimore & Ohio R. Co.*, [294 U. S. 240,]

302 [1935]; cf. *Feist* v. *Société Intercommunale Belge D'Électricité*, L. R. [1934] A. C. 161, 172, 173. . . . Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction." *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 336 (1937). The Convention was of the view that its standard of value must have intrinsic value, and that gold, valued throughout the world, was a most suitable measure of value. See 1 A. Smith, The Wealth of Nations 23–28 (1911); J. Mill, Principles of Political Economy 484–485 (1936); see also *The Legal Tender Cases*, 12 Wall. 457 (1871) (overruling *Hepburn* v. *Griswold*, 8 Wall. 603 (1870)); 12 Wall., at 624 (Clifford, J., dissenting); *id.*, at 647, 650 (Field, J., dissenting); *Bronson* v. *Rodes*, 7 Wall. 229, 246, 249 (1869); see generally *Hepburn* v. *Griswold*, 8 Wall., at 607–608; *Ogden* v. *Saunders*, 12 Wheat. 213, 265 (1827). Gold *was* money: "an universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or it is a sign which represents the respective values of all commodities." 1 W. Blackstone, Commentaries *276. The fluctuating and uncertain value of paper money, a fact long taken as gospel, *e. g.*, J. Mill, Principles of Political Economy 542–563 (1936); *The Legal Tender Cases*, 12 Wall., at 679 (Field, J., dissenting); *Bronson* v. *Rodes*, 7 Wall., at 246; *Craig* v. *Missouri*, 4 Pet. 410, 432 (1830), and a point hit home by the rampant inflation which had been decimating the paper currencies of Europe, including France, during the post World War I era, led the Convention expressly to reject such a standard of value.

The purpose and effect of gold clauses such as that contained in the Convention were not only well known in this country at the time the United States adhered to the Convention, such gold clauses were actually made unlawful in 1933. Congress declared that "every provision contained in or made with respect to any obligation which purports to give the obli-

gee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, . . . to be against public policy . . . ." Joint Resolution of June 5, 1933, 48 Stat. 113, 31 U. S. C. § 463(a) (1976 ed.).[3] The important point is that there simply was no question as to the purpose and effect of such a clause, absent some valid exercise of governmental power over the currency to subvert it. It "calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause. *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A. C. 161, 170–173; *Serbian and Brazilian Bond Cases*, P. C. I. J., series A., Nos. 20–21, pp. 32–34, 109–119. In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our internal economy at the due date." *Perry* v. *United States*, 294 U. S. 330, 358–359 (1935) (Stone, J., concurring); see also *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935); *Nortz* v. *United States*, 294 U. S. 317 (1935); *id.*, at 364 (McReynolds, J., dissenting) (gold clauses intended to afford definite standard or measure of value and thus guard against fluctuations in currency); see generally *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247 (1939).

III

The United States did not participate in the Warsaw proceedings, though it did send an observer. The Aeronautics

[3] Since the Convention was adhered to by the United States subsequent to the passage of this statute, presumably the Convention was an exception to this prohibition, unless we are to indulge the inference that Congress simultaneously abrogated and ratified the Convention. In any event, this statute has been repealed with respect to obligations incurred after October 27, 1977. 31 U. S. C. § 5118(d)(2). See 123 Cong. Rec. 33219–33220 (1977).

Branch of the Commerce Department studied the Convention and communicated with United States air carriers, who universally gave it their strong support. Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 502 (1967). The President submitted the Convention to the Senate in 1934, which gave its advice and consent by voice vote without committee hearings, committee reports, or floor debate. 78 Cong. Rec. 11582 (1934).

The Warsaw Convention's limitation on liability for damage to cargo has not been altered in the past half-century so far as the United States is concerned: the United States continues to adhere to the Convention as drafted in 1929.

Conditions in the world of aviation are, of course, radically different than they were 50 years ago. The Spirit of St. Louis, and the age of aviation it represents, are relics of the past. What was then a startling and daring feat for "Lucky Lindy" is now a humdrum occurrence for millions of travelers. Air travel is among the safest forms of transportation, and the fledging venture of a half century ago is a major, established international industry today. Nevertheless, though application of the Warsaw Convention's liability limitation is anachronistic in today's world of aviation, we are obliged to enforce it so long as the political branches of the Government adhere to the Convention. The maxim that *cessante ratione legis, cessat et ipsa lex*, applicable to the common law, does not govern the judiciary in cases involving application of positive law.

Conditions in the world of finance are, of course, also radically different than they were 50 years ago, when the nations of the world were attempting to reinstitute the international gold exchange standard, abandoned at the outbreak of World War I. The gold standard as a stable medium of international exchange, and the use of gold as an official standard of value for domestic purposes, are relics of the past. What has not changed, however, is the concept of a standard of value, and the effect of adopting one item as the standard as

opposed to another. A relic though a gold standard may be, it was the standard adopted by the Convention. The delegates to that Convention were schooled not in the theories of John Maynard Keynes, but rather, in the accepted learning of John Stuart Mill. We are as obliged to apply the standard of value agreed upon by the Convention as we are obliged to apply the liability limitation.[4] Indeed, of course, it is mean-

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[4] A staff memorandum addressed to the Civil Aeronautics Board on March 18, 1980, by the Chief, Policy Development Division, contains this telling comment on the background of the Warsaw liability limits and their contemporary relevance:

"The Warsaw Convention was negotiated during the late 1920's when the aviation industry was in its infancy. The minutes of the negotiations show that the primary concerns of the drafters are no longer of great importance to the industry. In addition, their assumptions about how the liability limitation mechanism would work were erroneous.

"In 1929, air travel was perceived by the public and, more importantly, by insurance companies to be an extremely risky mode of transportation. A major justification for limiting liability was that, unless carriers could present potential insurers with some degree of predictability in estimating damages from aircraft accidents, they would have great difficulty in obtaining coverage. Furthermore, the delegates had little sympathy for anyone foolish enough to board an airplane without enough personal insurance to provide for his widow (or her widower) and children should the plane crash. Over the years, air travel has become one of the safest modes of transportation, and airlines, even those operating under circumstances where they cannot limit their liability for death or personal injury, have no special difficulties finding insurers.

"The minutes also reflect the delegates' rationale for using gold as the unit of reference in determining carrier liability limits, instead of pegging the limits to some particular currency like the dollar or the franc, with no reference to the metal. . . .

"Warsaw has become an anachronism, yet various attempts to amend it have become stalled by the ratification process. While the Guatemala and Montreal Protocols would have revised the limits upward, the proposed limits were still relatively low, and none of the proposals contained a mechanism that would provide for periodical adjustments to compensate for inflation. Article 22 tied to gold, however, overcompensates for inflation to the point that the industry may view it as a sort of passengers' affirmative

ingless to attempt to speak of one without the other: a liability limitation has no meaning without reference to a standard of value.

"The value of a thing is what it will exchange for: the value of money is what money will exchange for; the purchasing power of money." J. Mill, Principles of Political Economy 489 (1936). The United States, of course, clung to a gold standard until recently. That is, gold was at least in theory an official standard of value for the currency and hence the number of dollars which would exchange for a given amount of gold was set by law. When the "price" of gold was fixed by law, the conversion of French francs, merely a sum of gold, into United States dollars, also merely a sum of gold, was determined by law. See generally *The Collector* v. *Richards*, 23 Wall. 246 (1875). Gold has now been demonetized. But the Convention's standard of value remains and the concept of value has not changed. The price of gold is simply no longer fixed by law. Gold, however, still will exchange for dollars. The rate at which a domestic currency exchanges for gold was and is the only "conversion" permitted or anticipated by the Convention. That figure *is* the liability limitation of the Warsaw Convention.

The $9.07-per-pound limit set in TWA's tariff is void under Article 23 of the Convention, which nullifies "[a]ny provision tending to relieve [a] carrier of liability or to fix a lower limit than that which is laid down in this convention." That tariff is no less void because it was accepted by the CAB. *E. g.*, 49 U. S. C. § 1502 (CAB must exercise its authority over tar-

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action plan that is supposed to make up for years of unreasonably low limits. Although gold-based limits may not be the most rational approach to allocating risks between carriers and consumers of international air transportation, the framers of Warsaw deliberately adopted this approach—expressly rejecting a dollar or some other currency-based system—and probably left us no flexibility as long as Warsaw remains in effect." App. 49–51 (footnote omitted).

iffs "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . .").[5]

The drafters of the Convention would surely have agreed that the "least covert of all modes of knavery . . . consists in calling a shilling a pound, that a debt of one hundred pounds may be cancelled by the payment of one hundred shillings." J. Mill, Principles of Political Economy 486 (1936). Basically, TWA invites us to call a dime a dollar, in order to can-

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[5] The majority asks why the CAB was "disqualified from setting a similar conversion rate *one year after Congress stopped doing so.*" *Ante*, at 255, n. 26 (emphasis supplied). So framed, the majority's question seems to answer itself. What the majority ignores is that the powers delegated to the CAB, 49 U. S. C. § 1502, previously quoted *supra*, must be exercised consistently with any convention in force, including the Warsaw Convention.

Although the Court makes a ritual of referring to the "CAB's choice" in its opinion (implying that it might not have made the same choice independently), *ante*, at 255, 256, 257, 258, 259, this is a suit between two private parties, not a declaratory judgment action challenging the CAB's exercise of its authority over tariffs. If it were, one would frame the question as whether the CAB has exercised its authority consistently with the Convention, though that is not how the majority frames the question presented at the outset of its opinion. *Ante*, at 245. In any event, the answer to that question, of course, turns on what the Convention means. On this matter, the CAB's views are not entitled to any special deference. While the Convention is a limitation on the CAB's powers, the CAB is not the governmental organ charged with enforcing the liability limitation—that responsibility rests with the courts of the United States. The Solicitor General correctly observes: "The Warsaw Convention is a self-executing treaty that provides a source of rules of decision applicable in United States courts without requiring enactment of any supplementary implementing legislation by Congress." Brief for United States as *Amicus Curiae* 16. Courts, not the CAB, render money judgments, and in rendering those money judgments, courts must apply the rules of decision provided by the Convention. Furthermore, even if some deference were to be accorded to the CAB's views, the CAB's position would have to be rejected since it conflicts with the plain meaning of the Convention.

cel a debt of 80,000 dollars by the payment of 80,000 dimes. We should not accept that invitation.

IV

The approach of the Court to this litigation is quite different from mine. Rather than attempting to ascertain the intent of the Convention and then applying the liability limitation thought appropriate by the Convention, the Court considers its function to make one up, with the aid of the Civil Aeronautics Board, so long as its "choice" is "sufficiently consistent" with the broad "purposes" of the Convention. *Ante*, at 256.[6]

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[6] The Court does speak of intent at the close of its opinion. *Ante*, at 260. Its approach to ascertaining intent is novel, to say the least. It postulates the general "purposes" of the liability limitation. It then divines the effects of a gold-based liability in today's world. It finds the general purposes inconsistent with a gold-based limitation, and concludes that the Convention did not intend to adopt a gold-based limitation. The rather telling deficiency with this conclusion is that the Convention did adopt a gold-based limitation. The Court itself must recognize this defect, for it tells us that to achieve their purposes, "the Convention's framers chose an international, not a parochial, standard, free from the control of any one country." *Ante*, at 256 (footnote omitted). Inexplicably, however, the Court then proceeds to ignore the standard the Convention selected. It does rely upon the practice of the signatories between 1934 and 1978. *Ante*, at 259. Our practice was consistent with the Convention so long as the price of gold was set by law. It is no longer. One commentator argued prior to the total demonetization of gold that the market price of gold should have been used in light of the economic reality of the early 1970's, see Heller, The Warsaw Convention and the "Two-Tier" Gold Market, 7 J. World Trade L. 126 (1973); Heller, The Value of the Gold Franc—A Different Point of View, 6 J. Mar. L. & Com. 73 (1974). The response to that argument rested on the fact that the price of gold was set by law—a fact that no longer obtains. See *Boehringer Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 531 F. Supp. 344, 353, n. 46 (SD Tex. 1981), appeal docketed, No. 81–2519 (CA5, Dec. 30, 1981).

The majority is correct in stating that I have no problem with the conclusion that our practice was consistent with the Convention when the price of

The purported textual basis in the Convention for the Court's freewheeling approach to this case is Article 22(4), which permits the sums of gold specified therein to be con-

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gold was set by law. *Ante*, at 254–255, n. 26. We need not speculate on that score, for at the outset of the Warsaw proceedings the drafters performed the very kind of conversion they anticipated would occur when a national currency was based on the gold standard—they converted the sums expressed in gold francs in the draft proposal into equivalent sums of new French francs.

The Convention did not, of course, deprive a signatory sovereign nation of its control over its own currency. Indeed, it was a recognition of that authority which led the Swiss delegate to insist that a sum of gold—rather than a reference to the 1928 French statute—be specified in the Convention. Congress has plenary power over our currency. See, *e. g.*, *The Legal Tender Cases*, 12 Wall. 457 (1871). In exercising that power, it may define the dollar in terms of gold. In doing so, and in periodically adjusting that relationship, it necessarily affects legal interests in many contractual areas. See, *e. g.*, *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935). For example, when Congress passed the Par Value Modification Act in 1972, setting a new price of gold, Congress "did not suggest that the CAB should thereafter use a different conversion factor" for Warsaw Convention purposes, but "the CAB did, of course, use that price to translate the Convention's gold-based liability limit into dollars." *Ante*, at 255. This was the only "flexible implementation" of the treaty which occurred from 1934 to 1978. *Ante*, at 259. The CAB, of course, had no flexibility—air carriers were bound by the Convention, and bound by Congress' decisions on monetary policy, see, *e. g.*, *Norman* v. *Baltimore & Ohio R. Co.*, *supra*. Congress has most recently exercised its authority over the currency by demonetizing gold completely. That has legal consequences as well. One of those consequences is that the rate of exchange between dollars and gold is no longer determined by law, and it is irrelevant that when Congress repealed the Par Value Modification Act it "did not suggest that the CAB should thereafter use a different conversion factor" for Warsaw Convention purposes. Congress has not delegated its authority over the currency to the CAB. And Congress clearly has not delegated authority to the CAB to violate Article 23 of the Convention—it has expressly stated that the CAB's authority must be exercised consistently with our treaty obligations. Congress itself, of course, does not have the authority to violate Article 23 short of repudiating the Convention. Congress naturally could repudiate the Convention and set its own liability limitation through domestic legislation, but has not done so.

verted into an equivalent amount of any national currency. *Ante*, at 260. The Court, of course, does not convert those sums into dollars; the Court converts the standard of value selected by the Convention into a standard of value expressly rejected by the Convention. In this way, it substitutes a fixed $9.07-per-pound liability limit for a liability limit of a sum of gold per pound. The only relationship between the two figures is a historical one: that is to say, one which no longer exists.[7]

The Court tells us that the limit agreed to by the Convention is "fluid, uncertain, and altogether inconvenient" in

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[7] The Court might as well have selected a figure corresponding to the dollar value of 12 grams of gold in 1929, or 1934, as that existing in 1978. Indeed, if the Court fancies itself competent to decide the proper liability limit necessary to effect the "purposes" of the Convention, one wonders why it selects a figure which happens to correspond to a value of a given amount of gold at any point in time. Since it adopts such a freewheeling approach to the subject, the Court could, for example, compute the liability limit in the same basic manner as did the Convention—dividing the declared value of all air cargo by the tonnage, and then doubling that figure to arrive at a per-pound limitation.

Any fixed dollar figure lower than the actual damage figure, of course, would meet all of the purposes postulated by the Court as well as $9.07 per pound. But it appears that the Court will be willing to modify the limit it has set from time to time, for it states that its limit "might require periodic adjustment . . . to account both for the dollar's changing value relative to other Western currencies and, if necessary, for changes in the conversion rates adopted by other Convention signatories." *Ante*, at 256. The only reason the Court apparently does not make such an adjustment is that since 1978, "no substantial changes of either type have occurred." *Ibid.* Of course, if the standard adopted by the Convention were enforced, rather than ignored, no such adjustments would need to be made by courts—for as the Court candidly admits, "[s]ince gold is freely traded on an international market its price always provides a unique and internationally uniform conversion rate." *Ante*, at 258. The fact that gold has always had a uniform value—since, to use the words of the Swiss delegate, there is but one quality of gold—was, of course, a major reason why it was chosen as a standard of value in an *international* agreement setting an *internationally* enforceable limitation on liability.

today's world. *Ante*, at 260.[8] If the Convention as drafted is unworkable in today's world, that should not be surprising. To paraphrase the majority, it was written for a few years, not for a half century of the most rapid and fundamental changes in the history of the planet. The majority takes the Convention written for a few years in the era of the Spirit of St. Louis, and rewrites it in the hope, I presume, that it will last a few more years into the age of the Space Shuttle. Just why it does so escapes me. The question whether that needs to be done and the question whether that *should* be done are simply not decisions for this Court to make.

The Court reaches its singularly peculiar result by concluding that the method of limiting liability chosen by the Convention would fail to effect any purpose of the Convention's framers in light of the contemporary domestic and international monetary structure. *Ante*, at 255.[9] Ironically, in

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[8] Compare *ante*, at 253 ("[W]hen the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine [of *rebus sic stantibus*] on their behalf").

[9] The response of the framers to this assertion by the majority, I am quite sure, would be "*au contraire*." Indeed, on the face of the majority opinion, only *one* of the purposes the Court identifies is not served by the gold standard—that of a stable and predictable limit. The other purposes, setting some limit, setting an internationally uniform limit, and linking the limit to a real value, are all achieved by the limit adopted by the Convention. In fact, the Court concedes the first purpose is served by any standard, *ante*, at 256, and seems to agree that the latter two purposes are better achieved by the limit adopted by the Convention, *ante*, at 258–259. Hence, even if I were to adopt the freewheeling approach of the Court to the question before us—that is, an independent judicial determination of which of several "choices" would "best effect" the "different and to some extent contradictory" general "purposes" of the Convention—I would find the Court's "choice" unpersuasive.

Gold was selected because it would continue to be an internationally recognized standard of value, irrespective of what national governments did with respect to their currencies. It was also selected to guard against the fluctuating values of currencies. Gold continues to be an internationally

essence, the Court agrees with the rationale of the Court of Appeals: that the limit is unenforceable on grounds of frustration of purpose. The Court differs with the Court of

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recognized standard of value. The legacy of eons is not readily discarded. See generally 1 Report to Congress of the Commission on the Role of Gold in the Domestic and International Monetary Systems 98 (Mar. 1982); M. Friedman & A. Schwartz, A Monetary History of the United States 473, 684 (1971). Its nominal value is still overwhelmingly its value in exchange, not its value in use—it is not simply another commodity. Fort Knox does not house any pork bellies. Currencies are worth far less in relation to gold than they were several years ago, that is, in perhaps bygone jargon, the currencies have been substantially devalued. The variation in the relative value of gold to currencies is not the *kind* of variation in value that the framers of the Convention wanted to avoid—it is one that they desired. Certainly, however, the extent of the current variation is more than they could have anticipated, and currencies have not devalued in overall purchasing power to the extent that they have in relation to gold.

The Court, in support of the standard it has selected—the dollar—thinks that the relative value of various currencies has remained relatively stable in recent years (a conclusion one cannot reach based on the data relied upon by the majority). Even if that were true, all that would mean is that the currencies have not depreciated in relation to one another—it does not mean that the currencies have not devalued. The real value of those currencies has not been stable, it has been declining. The real value of gold has not been stable either, but it has not declined since 1929. The same manifestly cannot be said of the dollar.

The interests in stability and predictability, of course, do favor the Court's choice. But the fact that the market price of gold fluctuates on a daily basis does not seem to me to present particularly serious problems. Indeed, the existence of a well-recognized daily price provides a simple point of reference for computing the exact amount of the limit on the date of shipment. The calculation of insurance rates would have to take into account the variable character of the gold market, but that is hardly a matter that underwriters are incapable of evaluating realistically. And, of course, the problem of computing their contingent tort liability for cargo would remain less difficult than the problem they confront in computing their contingent tort liability to third parties.

The idea that air transport users and carriers are forced to become unwilling speculators in the gold market is mere rhetoric. It stands history on its head even to suggest that the Warsaw Convention's liability limit

Appeals only in terms of the remedy. Whereas the Court of Appeals thought the appropriate remedy to be rescission of the agreement, the Court thinks the appropriate remedy is reformation of the agreement. Of course, if the premise of the Court is correct, and the liability limitation is unworkable in today's world, there is but one remedy: amendment of the Convention by the parties.[10]

V

Some students of the Court take for granted that our decisions represent the will of the judges rather than the will of the law.[11] This dogma may be the current fashion, but I remain convinced that such remarks reflect a profound misunderstanding of the nature of our work. Unfortunately, however, cynics—parading under the banner of legal realism—are given a measure of credibility whenever the Court bases a decision on its own notions of sound policy, rather

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has been foisted upon air carriers against their will. If, because of the demonetization of gold, the gold standard makes air carriers "speculators" in the gold market, and if the air carriers find this situation unacceptable, they can urge modification of the Convention. But, of course, they have already failed to secure Senate approval of the Montreal Protocols. Today, their attorneys win the battle that their lobbyists lost.

[10] Incredibly, the majority apparently derives some comfort from the fact that the liability limit it adopts is approximately equivalent in purchasing power to that contained in the Montreal Protocols, doing so in spite of the fact that the Montreal Protocols were rejected by the Senate. See *ante*, at 256–257. Indeed, the CAB accepts tariffs based on the Montreal Protocols, which passes by the majority without criticism. *Ante*, at 257, n. 29.

[11] For example, one law professor recently wrote in a doctrinaire fashion: "Modern jurisprudence regards the distinction Marshall Court justices sought to make between the 'will of the judge' and the 'will of the law' as a distinction without a difference. The 'legal' decisions of judges are, in the modern consciousness, necessarily personal and creative. . . .

". . . All of the modern canons for judicial behavior, and all of the modern theories of judicial performance, presuppose that judges 'make' law and that judicial will and legal will are thus inseparable." White, The Working Life of The Marshall Court, 1815–1835, 70 Va. L. Rev. 1, 49–50 (1984).

than on what the law commands.[12] It does so today.[13] The task of revising an international treaty is not one that this Court has any authority to perform. I respectfully dissent.

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[12] Judges, of course, must perform a lawmaking function, even in cases involving statutory construction. See, *e. g.*, R. Pound, The Spirit of the Common Law 170–175 (1921). But the limits of our authority and our ability to develop the law should always be respected. As Justice Cardozo explained:

"No doubt there is a field within which judicial judgment moves untrammeled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. . . . We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment. . . . In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. I think the difficulty has its origin in the failure to distinguish between right and power, between the command embodied in a judgment and the jural principle to which the obedience of the judge is due. Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law." B. Cardozo, The Nature of the Judicial Process 128–129 (1921).

[13] Perhaps the majority would insist that it is merely deferring to the CAB's notions of wise policy. If so, this would mean that the CAB could have made another choice to which the majority would have deferred. But surely the majority would not countenance selection of the choice made by the Convention itself, for the majority believes that choice would fail to effect any of the Convention's purposes. Moreover, I cannot see how the majority could defer to a choice of the limit set forth in the Montreal Protocols, given the fact that the Senate has recently rejected the Montreal Protocols. But see n. 10, *supra*. Nor can one imagine the Court "deferring" to the CAB's judgment if it selected the value of the current French franc. In short, it seems rather clear that the only potential choice of the CAB to which the majority would "defer" is the one it selected.

McDONALD *v.* CITY OF WEST BRANCH, MICHIGAN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83–219. Argued February 27, 1984—Decided April 18, 1984

When petitioner was discharged from respondent city's police force, he filed a grievance pursuant to the collective-bargaining agreement between the city and a labor union, contending that there was "no proper cause" for his discharge. The grievance was ultimately taken to arbitration, and the arbitrator ruled against petitioner, finding that there was just cause for his discharge. Petitioner did not appeal this decision, but filed an action in Federal District Court under 42 U. S. C. § 1983 against the city and certain of its officials, including the Chief of Police, alleging that he was discharged for exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances. The jury returned a verdict against the Chief of Police but in favor of the other defendants. The Court of Appeals reversed the judgment against the Chief of Police, holding that petitioner's First Amendment claims were barred by res judicata and collateral estoppel.

Held: In a § 1983 action, a federal court should not afford res judicata or collateral estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement, and hence petitioner's § 1983 action was not barred by the arbitration award. Pp. 287–292.

(a) Title 28 U. S. C. § 1738—which provides that the "judicial proceedings" of any court of any State shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such State from which they are taken—does not require that preclusive effect be given to the arbitration award in question. Arbitration is not a "judicial proceeding" and, therefore, § 1738 does not apply to arbitration awards. Pp. 287–288.

(b) Although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights. This conclusion is supported by the facts that an arbitrator may not have the expertise to resolve the complex legal questions that arise in § 1983 actions or the authority to

enforce § 1983; that a union's usual exclusive control over grievance procedures may result in an employee's loss of an opportunity to be compensated for a constitutional deprivation merely because it was not in the union's interest to press his grievance vigorously; and that arbitral fact-finding is generally not equivalent to judicial factfinding. Pp. 288–292. 709 F. 2d 1505, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

David Achtenberg argued the cause for petitioner. With him on the briefs was *Irving Achtenberg*.

Richard G. Smith argued the cause for respondents. With him on the briefs was *Mona C. Doyle*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this § 1983 action is whether a federal court may accord preclusive effect to an unappealed arbitration award in a case brought under that statute.[1] In an unpublished opinion, the Court of Appeals for the Sixth Circuit held that such awards have preclusive effect. We granted certiorari, 464 U. S. 813 (1983), and now reverse.

I

On November 26, 1976, petitioner Gary McDonald, then a West Branch, Mich., police officer, was discharged. McDon-

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Robert M. Weinberg, Michael H. Gottesman, Laurence Gold, J. Albert Woll, Bernard Kleiman,* and *Carl B. Frankel;* and for the Edwin F. Mandel Legal Aid Clinic by *Gary H. Palm.*

Robert E. Williams, Douglas S. McDowell, and *Thomas R. Bagby* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

[1] Title 42 U. S. C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

ald filed a grievance pursuant to the collective-bargaining agreement then in force between West Branch and the United Steelworkers of America (the Union), contending that there was "no proper cause" for his discharge, and that, as a result, the discharge violated the collective-bargaining agreement.[2] After the preliminary steps in the contractual grievance procedure had been exhausted, the grievance was taken to arbitration. The arbitrator ruled against McDonald, however, finding that there was just cause for his discharge.

McDonald did not appeal the arbitrator's decision. Subsequently, however, he filed this § 1983 action against the city of West Branch and certain of its officials, including its Chief of Police, Paul Longstreet.[3] In his complaint, McDonald alleged that he was discharged for exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances.[4] The case was tried to a jury which returned a verdict against Longstreet, but in favor of the remaining defendants.

On appeal, the Court of Appeals for the Sixth Circuit reversed the judgment against Longstreet. 709 F. 2d 1505 (1983). The court reasoned that the parties had agreed to settle their disputes through the arbitration process and

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[2] Section 3.0 of Article III of the collective-bargaining agreement between the city of West Branch and the Union provided in pertinent part:

"Among the powers, rights, authority, duties and responsibilities which shall continue to be vested in the City of West Branch, but not intended as a wholly inclusive list of them, shall be: The right to . . . suspend or discharge employees for proper cause."

[3] In addition to Longstreet, the complaint named the following city officials as defendants: Acting City Manager Bernard Olson, City Attorney Charles Jennings, and City Attorney Demetre Ellias. McDonald also named the Union as a defendant, claiming that it had breached its state-law duty to represent him fairly. The District Court declined to exercise pendent jurisdiction over this claim.

[4] In addition, McDonald alleged that his discharge deprived him of property without due process of law. The jury, however, rejected this claim.

that the arbitrator had considered the reasons for McDonald's discharge. Finding that the arbitration process had not been abused, the Court of Appeals concluded that McDonald's First Amendment claims were barred by res judicata and collateral estoppel.[5]

II

A

At the outset, we must consider whether federal courts are obligated by statute to accord res judicata or collateral-estoppel effect to the arbitrator's decision. Respondents contend that the Federal Full Faith and Credit Statute, 28 U. S. C. § 1738, requires that we give preclusive effect to the arbitration award.

Our cases establish that § 1738 obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment. See, *e. g.*, *Migra* v. *Warren City School District Board of Education*, 465 U. S. 75, 81 (1984); *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 466 (1982). As we explained in *Kremer*, however, "[a]rbitration decisions . . . are not subject to the mandate of § 1738." *Id.*, at 477. This conclusion follows from the plain language of § 1738 which provides in pertinent part that the "*judicial proceedings* [of any court

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[5] Earlier this Term, we noted that various phrases have been used to describe the preclusive effects of former judgments. *Migra* v. *Warren City School District Board of Education*, 465 U. S. 75 (1984). Because the Court of Appeals used the terms "res judicata" and "collateral estoppel," we find it convenient to use these terms in this opinion. Thus, in this case, we utilize the term "res judicata" to refer to the effect of a judgment on the merits in barring a subsequent suit between the same parties or their privies that is based on the same claim. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326, n. 5 (1979). By contrast, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980).

of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken." (Emphasis added.)[6] Arbitration is not a "judicial proceeding" and, therefore, § 1738 does not apply to arbitration awards.[7]

B

Because federal courts are not required by statute to give res judicata or collateral-estoppel effect to an unappealed arbitration award, any rule of preclusion would necessarily be judicially fashioned. We therefore consider the question whether it was appropriate for the Court of Appeals to fashion such a rule.

On two previous occasions this Court has considered the contention that an award in an arbitration proceeding brought pursuant to a collective-bargaining agreement should preclude a subsequent suit in federal court. In both instances we rejected the claim.

Alexander v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), was an action under Title VII of the Civil Rights Act of 1964

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[6] The complete text of § 1738 provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[7] The statute also applies to Acts of state legislatures and records of state courts. See n. 6, *supra*. Arbitration obviously falls into neither of these categories.

brought by an employee who had unsuccessfully claimed in an arbitration proceeding that his discharge was racially motivated. Although Alexander protested the same discharge in the Title VII action, we held that his Title VII claim was not foreclosed by the arbitral decision against him.[8] In addition, we declined to adopt a rule that would have required federal courts to defer to an arbitrator's decision on a discrimination claim when "(i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy." *Id.*, at 55–56.

Similarly, in *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981), Barrentine and a fellow employee had unsuccessfully submitted wage claims to arbitration. Nevertheless, we rejected the contention that the arbitration award precluded a subsequent suit based on the same underlying facts alleging a violation of the minimum wage provisions of the Fair Labor Standards Act. *Id.*, at 745–746.

Our rejection of a rule of preclusion in *Barrentine* and our rejection of a rule of deferral in *Gardner-Denver* were based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes. 450 U. S., at 740–746; 415 U. S., at 56–60. These considerations similarly require that we find the doctrines of res judicata and collateral estoppel inapplicable in this § 1983 action.

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[8] The Court of Appeals in *Gardner-Denver* had concluded that the Title VII suit was barred by the doctrines of election of remedies and waiver, and by "the federal policy favoring arbitration of labor disputes." 415 U. S., at 46. In addition to holding that none of these doctrines justified a rule of preclusion, we noted that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel." *Id.*, at 49, n. 10.

Because § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable. Indeed, as we explained in *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." See also *Patsy* v. *Florida Board of Regents*, 457 U. S. 496, 503 (1982). And, although arbitration is well suited to resolving contractual disputes, our decisions in *Barrentine* and *Gardner-Denver* compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights. We need only briefly reiterate the considerations that support this conclusion.

First, an arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." *Gardner-Denver*, *supra*, at 57. An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in § 1983 actions.[9]

Second, because an arbitrator's authority derives solely from the contract, *Barrentine*, *supra*, at 744, an arbitrator may not have the authority to enforce § 1983. As we explained in *Gardner-Denver:* "The arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . . If an arbitral decision is based 'solely upon the arbitrator's view of the requirements

[9] Indeed, many arbitrators are not lawyers. See *Barrentine* v. *Arkansas-Best Freight System, Inc.* 450 U. S. 728, 743 (1981); *Gardner-Denver*, 415 U. S., at 57, n. 18. In addition, *amici* AFL–CIO and the United Steelworkers of America note that "[t]he union's case in a labor arbitration is commonly prepared and presented by non-lawyers." Brief as *Amici Curiae* 10.

of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." 415 U. S., at 53, quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960). Indeed, when the rights guaranteed by § 1983 conflict with provisions of the collective-bargaining agreement, the arbitrator must enforce the agreement. *Gardner-Denver*, 415 U. S., at 43.

Third, when, as is usually the case,[10] the union has exclusive control over the "manner and extent to which an individual grievance is presented," *Gardner-Denver*, *supra*, at 58, n. 19, there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. See *Gardner-Denver*, *supra*, at 58, n. 19; *Barrentine*, *supra*, at 742. Thus, were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.

Finally, arbitral factfinding is generally not equivalent to judicial factfinding. As we explained in *Gardner-Denver*, "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." 415 U. S., at 57–58.

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[10] *Amici* AFL–CIO and the United Steelworkers of America inform us that under most collective-bargaining agreements the union "controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case." *Id.*, at 7.

It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial.[11] Consequently, according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide.[12] We therefore hold that in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement.[13]

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[11] In addition to diminishing the protection of federal rights, a rule of preclusion might have a detrimental effect on the arbitral process. Were such a rule adopted, employees who were aware of this rule and who believed that arbitration would not protect their § 1983 rights as effectively as an action in a court might bypass arbitration. See *Gardner-Denver*, *supra*, at 59.

[12] The Court of Appeals justified its application of res judicata and collateral estoppel in part by stating that "[t]he parties have agreed to settle this dispute through the private means of arbitration." In both *Gardner-Denver* and *Barrentine*, however, we rejected similar contentions. See *Gardner-Denver*, *supra*, at 51–52; *Barrentine*, *supra*, at 736–746. For example, in *Gardner-Denver* we considered the argument that the arbitration provision of the collective-bargaining agreement waived the employee's right to bring a Title VII action. We found this contention unpersuasive, however, concluding that "[t]he rights conferred [by Title VII] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Gardner-Denver*, *supra*, at 51. Similarly, because preclusion of a judicial action would gravely undermine the effectiveness of § 1983, we must reject the Court of Appeals' reliance on and deference to the provisions of the collective-bargaining agreement.

[13] Consistent with our decisions in *Barrentine* and *Gardner-Denver*, an arbitral decision may be admitted as evidence in a § 1983 action. As in those cases:

"We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with [the statute or constitution], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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issue [in the judicial proceeding], and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of [these] claims. It is the duty of courts to assure the full availability of this forum." *Gardner-Denver*, 415 U. S., at 60, n. 21. See also *Barrentine*, 450 U. S., at 743–744, n. 22.

JUSTICES OF BOSTON MUNICIPAL COURT *v.* LYDON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–1479. Argued December 6, 1983—Decided April 18, 1984

Under Massachusetts law, a defendant charged with certain minor crimes in Boston Municipal Court may elect to have a bench trial or a jury trial. If he chooses a jury trial and is convicted, he has the normal appellate process open to him, but if he chooses a bench trial and is dissatisfied with the results, he has an absolute right to a trial *de novo* before a jury and need not allege error at the bench trial to obtain *de novo* review. However, there is no right to appellate review of a bench trial conviction. Respondent elected to undergo a first-tier bench trial on a charge of knowing possession of implements designed for breaking into an automobile to steal property. He was convicted and sentenced to a jail term, the trial judge having rejected his claim that the prosecution had introduced no evidence of intent to steal. Respondent then requested a *de novo* jury trial and was released on personal recognizance pending retrial. Before the jury trial commenced, respondent moved to dismiss the charge on the ground that no evidence of intent had been presented at the bench trial and thus retrial was barred under *Burks* v. *United States*, 437 U. S. 1, which held that the Double Jeopardy Clause bars a second trial when a reviewing court reverses a conviction on the ground that the evidence presented at the first trial was legally insufficient. The motion to dismiss was denied, and respondent then sought relief in the Massachusetts Supreme Judicial Court, which ultimately held that *Burks* was inapplicable because no appellate court had ruled that the evidence was insufficient at respondent's bench trial. The Massachusetts court also ruled that a trial *de novo* without a determination as to the sufficiency of the evidence at the bench trial would not violate the Double Jeopardy Clause. Respondent then sought habeas corpus relief in Federal District Court, which held that respondent was "in custody" for purposes of 28 U. S. C. § 2254(b) and that he had exhausted his state remedies. Finding for respondent on the merits, the court concluded that, under *Burks*, a second trial was foreclosed if the evidence against respondent at the bench trial was insufficient, and that there was insufficient evidence of intent at the bench trial to support respondent's conviction. The Court of Appeals affirmed.

Held:

1. The District Court had jurisdiction to entertain respondent's habeas corpus action. Pp. 300–303.

(a) For purposes of the federal habeas corpus statutes, respondent was in "custody" even though his conviction was vacated when he applied for a trial *de novo* and he had been released on personal recognizance. The use of habeas corpus is not restricted to situations in which the applicant is in actual physical custody. The Massachusetts statute under which respondent was released subjected him to restraints not shared by the public generally, including the obligations to appear in court for trial and not to depart without leave. Cf. *Hensley* v. *Municipal Court*, 411 U. S. 345. Pp. 300–302.

(b) Respondent had exhausted his state remedies with respect to his double jeopardy claim. The Massachusetts Supreme Judicial Court rejected his claim, and the fact that he might ultimately be acquitted at the trial *de novo* did not alter the fact that he had taken his claim that he should not be tried again as far as he could in the state courts. A requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court, would require him to sacrifice the protection of the Double Jeopardy Clause against being twice put to trial for the same offense. Pp. 302–303.

2. Respondent's retrial *de novo* without any judicial determination of the sufficiency of the evidence at his prior bench trial will not violate the Double Jeopardy Clause. Pp. 304–313.

(a) *Ludwig* v. *Massachusetts*, 427 U. S. 618—upholding a prior Massachusetts two-tier system of trial courts that differed from the present one by requiring a defendant to participate in the first-tier proceedings and by not allowing him to choose a jury trial in the first instance—was not disturbed by the decision in *Burks*, *supra*, and is dispositive of the double jeopardy issue here. Pp. 304–306.

(b) In this case, the State is not attempting, contrary to the guarantees embodied in the Double Jeopardy Clause, to impose multiple punishments for a single offense or to convict respondent after acquittal. Respondent has not been acquitted; he simply maintains that he ought to have been. Pp. 306–308.

(c) The concept of "continuing jeopardy" is implicit in the general rule that the Double Jeopardy Clause does not bar retrial after reversal of a conviction. Acquittal terminates the initial jeopardy, and *Burks* recognizes that a determination by a reviewing court that the evidence was legally insufficient likewise terminates the initial jeopardy. Respondent failed to identify any stage of the state proceedings that can be held to have terminated jeopardy. Pp. 308–310.

(d) The Massachusetts system does not constitute governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect, even when a defendant convicted at the first tier claims insufficiency of the evidence. The defendant's absolute right to obtain a *de novo* jury trial without alleging error at the bench trial ame-

liorates the danger of affording the prosecution an opportunity to supply evidence which it failed to muster in the first proceeding. The prosecution has every incentive to put forward its strongest case at the bench trial, because an acquittal would preclude reprosecution of the defendant. There is nothing to stop a defendant from choosing a bench trial for the sole purpose of getting a preview of the State's case to enable him to prepare better for the jury trial. The two-tier system, unlike a more conventional system, gives a defendant two opportunities to be acquitted on the facts. If the prosecution obtains a conviction at the second trial, the defendant then has the usual appellate remedies. Pp. 310–312.

698 F. 2d 1, reversed.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN and REHNQUIST, JJ., joined; in Parts I and II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined; and in Parts I, II–B, III, and IV of which BURGER, C. J., and POWELL, J., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 313. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 327. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 328. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 337.

Barbara A. H. Smith, Assistant Attorney General of Massachusetts, argued the cause for petitioners. With her on the briefs were *Francis X. Bellotti*, Attorney General, and *Michael J. Traft*.

David B. Rossman argued the cause for respondent. With him on the brief was *Eva Nilsen*.*

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari, 463 U. S. 1206 (1983), to review a decision of the Court of Appeals for the First Circuit affirming the issuance of a writ of habeas corpus. The Court of Appeals agreed with the District Court that the trial *de novo* of respondent Lydon, pursuant to Massachusetts' "two-

**Eric D. Blumenson, Burt Neuborne, Charles S. Sims, John Reinstein,* and *Marjorie Heins* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

tier" system for trying minor crimes, would violate his right not to be placed twice in jeopardy for the same crime, because it determined that insufficient evidence of a critical element of the charge was adduced at the first-tier trial. We reverse.

I

Under Massachusetts law, a defendant charged with certain crimes in Boston Municipal Court may elect either a bench trial or a jury trial. Mass. Gen. Laws Ann., ch. 218, §§ 26, 26A (West Supp. 1983–1984). If a defendant chooses a jury and is convicted, he has the normal appellate process open to him, while a defendant dissatisfied with the results of a bench trial, if he elects that course, has an absolute right to a trial *de novo* before a jury.[1] §§ 26 and 27A. A convicted defendant who has chosen a bench trial need not allege error at that trial to obtain *de novo* review. On the other hand, he may not rely upon error at the bench trial to obtain reversal of his conviction; his only recourse is a trial *de novo*.

Respondent Michael Lydon was arrested after breaking into an automobile in Boston. He was charged with the knowing possession of implements "adapted and designed for forcing and breaking open a depository [an automobile] in order to steal therefrom, such money or other property as might be found therein" with intent "to use and employ them therefor." Record, Complaint. Lydon elected to undergo a first-tier bench trial and was convicted. The trial judge rejected Lydon's claim that the prosecution had introduced no evidence that Lydon intended to steal from the car and that his actions were as consistent with activities not covered by the complaint. Lydon was sentenced to two years in jail.

Lydon requested a trial *de novo* in the jury session of the Boston Municipal Court. Pending retrial, he was released

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[1] At the second-tier trial, a defendant may waive a jury and undergo a second bench trial. Mass. Gen. Laws Ann., ch. 218, § 27A(g) (West Supp. 1983–1984).

on personal recognizance. Before the jury trial commenced, Lydon moved to dismiss the charge against him on the ground that no evidence of the element of intent had been presented at the bench trial. He contended that retrial was therefore barred under the principles of *Burks* v. *United States*, 437 U. S. 1 (1978), which held that the Double Jeopardy Clause bars a second trial when a reviewing court reverses a conviction on the ground that the evidence presented at the first trial was legally insufficient.

After the motion to dismiss was denied, Lydon sought relief in the single justice session of the Supreme Judicial Court of Massachusetts. See Mass. Gen. Laws Ann., ch. 211, §3 (West 1958). The single justice issued a stay of the *de novo* trial and reported two questions to the full bench:

> "1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?
>
> "2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?"

The single justice did not report a finding on the sufficiency of the evidence, although he did state that he was "of the view that the evidence was not sufficient to warrant guilty findings." Record, Reservation and Report, at 3. He also noted that the prosecution conceded that the evidence presented was insufficient to warrant a finding of guilt on the charges set forth in the complaint. *Ibid.*

On review by the Supreme Judicial Court, the court initially noted that the single justice did not sit as a reviewing

court in determining the sufficiency of the evidence and that any conclusion reached by him on that issue "was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case." *Lydon* v. *Commonwealth*, 381 Mass. 356, 359, n. 6, 409 N. E. 2d 745, 748, n. 6, cert. denied, 449 U. S. 1065 (1980). The Massachusetts court then found Lydon's double jeopardy argument to be without merit. Because no appellate court had ruled that the evidence was insufficient at Lydon's trial, and indeed no court ever would have occasion to do so under Massachusetts law, the court found *Burks* inapplicable. *Burks*, the court observed, did not address the question whether under double jeopardy principles a defendant convicted on insufficient evidence at a bench trial has a right to reconsideration of the sufficiency of the evidence prior to a trial *de novo*. The court concluded that "[a] defendant is not placed in double jeopardy merely because his only avenue of relief from a conviction based on insufficient evidence at a voluntarily sought bench trial is a trial de novo." 381 Mass., at 367, 409 N. E. 2d, at 752. As to the second reported question, the court concluded that if there is a valid double jeopardy claim, it should be dealt with prior to the trial *de novo*, although it acknowledged that its conclusion on this question was "rendered largely academic" by its answer to the first question since any double jeopardy claim presented to the second-tier court would necessarily be rejected. *Id.*, at 366, 409 N. E. 2d, at 752.

Lydon then filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. First addressing the question of its jurisdiction, the District Court held that Lydon was "in custody" for purposes of 28 U. S. C. § 2254(b) and that he had exhausted his state remedies because there was no state remedy available to him short of submitting to a second trial. 536 F. Supp. 647 (1982). On the merits, the District Court viewed *Burks* v. *United States*, *supra*, as "bestow[ing] a constitutional right upon defendants not to be retried when the initial con-

viction rests on insufficient evidence," 536 F. Supp., at 651, and thought that this holding foreclosed a second trial if the evidence against Lydon at the bench trial was insufficient, *id.*, at 652. After reviewing the transcript of the bench trial, the District Court concluded that there was insufficient evidence of intent to support a conviction and ordered the writ to issue. On appeal, a divided Court of Appeals for the First Circuit affirmed in all respects. 698 F. 2d 1 (1982).

II

A

We first address the Commonwealth's contention that the District Court lacked jurisdiction to entertain Lydon's habeas corpus action because he was not in "custody" for purposes of the statute and had not exhausted his state remedies. Under 28 U. S. C. § 2241(c), a "writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States." Similarly, 28 U. S. C. § 2254(a) states that a writ of habeas corpus is available to persons "in custody pursuant to the judgment of a State court." Petitioners argue that because Lydon's first conviction had been vacated when he applied for a trial *de novo*, and because he had been released on personal recognizance, he was not in "custody."

Our cases make clear that "the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." *Jones* v. *Cunningham*, 371 U. S. 236, 239 (1963). In *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), we held that a petitioner enlarged on his own recognizance pending execution of sentence was in custody within the meaning of 28 U. S. C. §§ 2241(c)(3) and 2254(a). Hensley's release on personal recognizance was subject to the conditions that he would appear when ordered by the court, that he would waive extradition if he was apprehended outside the State, and that a court could revoke the order of release and require that he be returned to confinement or

post bail. Although the restraints on Lydon's freedom are not identical to those imposed on Hensley, we do not think that they are sufficiently different to require a different result.

The Massachusetts statute under which Lydon was released subjects him to "restraints not shared by the public generally." 411 U. S., at 351. He is under an obligation to appear for trial in the jury session on the scheduled day and also "at any subsequent time to which the case may be continued . . . and so from time to time until the final sentence." Mass. Gen. Laws Ann., ch. 278, § 18 (West 1981). Failure to appear "without sufficient excuse" constitutes a criminal offense. Ch. 276, § 82A. Also, if Lydon fails to appear in the jury session, he may be required, without a further trial, to serve the 2-year sentence originally imposed. Ch. 278, § 24. Finally, the statute requires that he "not depart without leave, and in the meantime . . . keep the peace and be of good behavior." Ch. 278, § 18. Consequently, we believe that the Court of Appeals correctly held that Lydon was in custody.

Petitioners contend that a conclusion that a person released on personal recognizance is in custody for purposes of the federal habeas corpus statutes will "ope[n] the door to the federal court to all persons prior to trial." Brief for Petitioners 24. We addressed the same argument in *Hensley:*

> "Finally, we emphasize that our decision does not open the doors of the district courts to the habeas corpus petitions of all persons released on bail or on their own recognizance. We are concerned here with a petitioner who has been convicted in state court and who has apparently exhausted all available state court opportunities to have that conviction set aside. Where a state defendant is released on bail or on his own recognizance pending trial or pending appeal, he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts. Noth-

ing in today's opinion alters the application of that doctrine to such a defendant." 411 U. S., at 353.[2]

B

We are also convinced that Lydon had exhausted his state remedies with respect to his claim that his second trial would violate his right not to be twice placed in jeopardy unless it is judicially determined that the evidence at his first trial was sufficient to sustain his conviction.[3] This precise claim was presented to and rejected by the Supreme Judicial Court of Massachusetts. That court definitively ruled that Lydon had no right to a review of the sufficiency of the evidence at the first trial and that his trial *de novo* without such a determination would not violate the Double Jeopardy Clause. That Lydon may ultimately be acquitted at the trial *de novo* does not alter the fact that he has taken his claim that he should not be tried again as far as he can in the state courts.

We should keep in mind in this respect the unique nature of the double jeopardy right. In *Abney* v. *United States*, 431 U. S. 651 (1977), the Court held that denial of a motion to dismiss an indictment on double jeopardy grounds constitutes a

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[2] We do not carve out a special-purpose jurisdictional exception for double jeopardy allegations with respect to custody. Nothing in our discussion of custody is dependent upon the nature of the claim that is raised. To the extent that double jeopardy claims are treated differently for habeas purposes, it is because of the application of the exhaustion principle, not because a different definition of custody is adopted.

[3] The exhaustion requirement is set forth in 28 U. S. C. § 2254, which provides in relevant part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

final order for purposes of 28 U. S. C. § 1291. That decision was based upon the special nature of the double jeopardy right and the recognition that the right cannot be fully vindicated on appeal following final judgment, since in part the Double Jeopardy Clause protects "against being twice put to *trial* for the same offense." *Id.*, at 661 (emphasis in original). Because the Clause "protects interests wholly unrelated to the propriety of any subsequent conviction," *ibid.*, a requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court, would require him to sacrifice one of the protections of the Double Jeopardy Clause.[4]

In our view, therefore, Lydon had exhausted his double jeopardy claim in the state courts, and that precondition to the District Court's jurisdiction was satisfied. We conclude below, however, that the District Court and the Court of Appeals erred in sustaining Lydon's double jeopardy claim: in our view, Lydon could be retried *de novo* without any judicial determination of the sufficiency of the evidence at his prior bench trial.[5]

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[4] Section 2254(b) specifically allows for the issuance of habeas writs when circumstances exist "rendering [state] process ineffective to protect the rights of the prisoner." In the circumstances of this case, there are no more state procedures of which Lydon may avail himself to avoid an allegedly unconstitutional second trial.

[5] If our conclusion were otherwise, a further exhaustion issue would arise. The District Court and the Court of Appeals not only held that Lydon was entitled to a determination of the sufficiency of the evidence at his first trial but also proceeded to make this evidentiary determination. Yet it seems to us that the Supreme Judicial Court of Massachusetts held that any double jeopardy claim Lydon might have should be made prior to the beginning of the second trial, although it candidly stated that under its opinion no such claim could succeed. If the Massachusetts court was wrong, however, in ruling that Lydon was not entitled to a sufficiency determination, it is apparent that the way would be open for him to present his claim to the *de novo* court in precisely the manner that the Massachusetts court suggested that a double jeopardy claim should be submitted. In our view, therefore, the federal habeas corpus court in any event should not itself have ruled on the sufficiency of the evidence at Lydon's first trial

III

In *Ludwig* v. *Massachusetts*, 427 U. S. 618 (1976), we upheld a prior Massachusetts two-tier system of trial courts for criminal cases. The present system differs from the system upheld in *Ludwig* in only one respect of significance here. Prior to the Massachusetts Court Reorganization Act of 1978, a defendant could not elect a jury trial in the first instance; he was required to participate in the first-tier proceedings. Under the present system, as noted above, a defendant may avoid the first-tier trial altogether and proceed directly to the jury trial. In upholding the prior Massachusetts system, we stated:

> "The Massachusetts system presents no danger of prosecution after an accused has been pardoned; nor is there any doubt that acquittal at the first tier precludes reprosecution. Instead, the argument appears to be that because the appellant has been placed once in jeopardy and convicted, the State may not retry him when

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but should have stayed its hand and permitted the state court to make that determination in the first instance. Otherwise, Lydon could not be said to have exhausted his state remedies and satisfied the requirements of § 2254.

It is for that reason that reliance by Lydon and the courts below on *Jackson* v. *Virginia*, 443 U. S. 307 (1979), is misplaced. *Jackson* held that federal habeas courts must consider a petitioner's federal due process claim that the evidence in support of his conviction was insufficient to have led a rational trier of fact to find him guilty beyond a reasonable doubt. No one has suggested, however, that *Jackson* in any way created an exception to the exhaustion requirement.

Because in our view Lydon may be retried and convicted without a review of the sufficiency of the evidence at his bench trial, there will never be an occasion for a federal habeas corpus court to deal with the evidentiary issue at that trial. Since JUSTICE STEVENS disagrees with our double jeopardy decision, he asserts that the federal court must perform its *Jackson* v. *Virginia* function with respect to the evidence at the first trial. He would postpone that task until after the second trial, however. Of course, if Lydon is convicted at his jury trial, the sufficiency of the evidence at that trial will concededly be open to review in a federal court, as *Jackson* v. *Virginia* mandates.

he informs the trial court of his decision to 'appeal' and to secure a trial *de novo*.

"Appellant's argument is without substance. The decision to secure a new trial rests with the accused alone. A defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it long has been clear that the State may reprosecute. *United States* v. *Ball*, 163 U. S. 662 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a 'reversal' and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal." *Id.*, at 631–632.

Our decision in *Ludwig*, which we think is dispositive of the double jeopardy issue in this case, was not disturbed by our later decision in *Burks* v. *United States*, 437 U. S. 1 (1978). In *Burks*, the petitioner's conviction had been set aside by the Court of Appeals on the ground that there had been insufficient evidence presented at his trial to support the verdict. The Court of Appeals then ordered the case remanded to the District Court for a determination of whether a new trial should be ordered or a directed verdict of acquittal should be entered. We reversed, stating:

"In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. . . .

"The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial,

in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Id.*, at 15–16. (footnote omitted) (emphasis in original).

We summarized our holding in *Burks* as being "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.*, at 18.

Lydon argues, and the Court of Appeals held, that our statement in *Ludwig* that a defendant who elects to be tried *de novo* is in the same position as a convicted defendant who successfully appeals, combined with our holding in *Burks* that the setting aside of a conviction on the basis of evidentiary insufficiency bars retrial, mandates the conclusion that a trial *de novo* is barred by the Double Jeopardy Clause if the evidence presented at the bench trial was insufficient to support a finding of guilt. We are unpersuaded.

A

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." In *Benton* v. *Maryland*, 395 U. S. 784 (1969), we held that this guarantee is applicable to the States through the Fourteenth Amendment.

Our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after con-

viction, and against multiple punishments for the same offense. *Illinois* v. *Vitale*, 447 U. S. 410, 415 (1980).[6] The primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant. As was explained in *Green* v. *United States*, 355 U. S. 184, 187–188 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The primary purpose of foreclosing a second prosecution after conviction, on the other hand, is to prevent a defendant from being subjected to multiple punishments for the same offense. See *United States* v. *Wilson*, 420 U. S. 332, 343 (1975).

In this case, the Commonwealth is not attempting to impose multiple punishments for a single offense. Nor is it making another attempt to convict Lydon after acquittal. It is satisfied with the results of the bench trial and would have abided the results of a jury trial had Lydon taken that initial course. The conceptual difficulty for Lydon is that he has not been acquitted; he simply maintains that he ought to have been. His claim is that the evidence at the bench trial was insufficient to convict and that a second trial to a jury will offend the fundamental rule that a verdict of acquittal may "not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy." *United States* v. *Ball*, 163

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[6] The Clause also, of course, protects against retrial after the declaration of a mistrial in certain circumstances. See *United States* v. *Scott*, 437 U. S. 82 (1978).

U. S. 662, 671 (1896); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977). Our cases, however, do not take us as far as Lydon would like.

B

The Double Jeopardy Clause is not an absolute bar to successive trials. The general rule is that the Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal. *United States* v. *Ball*, *supra*. The justification for this rule was explained in *United States* v. *Tateo*, 377 U. S. 463, 466 (1964), as follows:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."

In *Price* v. *Georgia*, 398 U. S. 323, 329 (1970), we recognized that implicit in the *Ball* rule permitting retrial after reversal of a conviction is the concept of "continuing jeopardy." See also *Breed* v. *Jones*, 421 U. S. 519, 534 (1975). That principle "has application where criminal proceedings against an accused have not run their full course." 398 U. S., at 326. Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver. *Id.*, at 329, n. 4. Acquittals, unlike convictions, terminate the initial jeopardy. This is so whether they are "express or implied by a conviction on a lesser included offense." *Id.*, at 329. In *Burks*, 437 U. S. 1 (1978), we recognized that an

unreversed determination by a reviewing court that the evidence was legally insufficient likewise served to terminate the initial jeopardy.

We assume, without deciding, that jeopardy attached at the swearing of the first witness at Lydon's bench trial. The question then is whether jeopardy has now terminated. Lydon's double jeopardy argument requires an affirmative answer to that question, but he fails to identify any stage of the state proceedings that can be held to have terminated jeopardy. Unlike Burks, who could rest his claim upon the appellate court's determination of insufficiency, Lydon is faced with the unreversed determination of the bench-trial judge, contrary to Lydon's assertion, that the prosecution had met its burden of proof. We noted in *United States* v. *Martin Linen Supply Co.*, *supra*, at 571, that an acquittal "represents *a resolution*, correct or not, of some or all of the factual elements of the offense charged." (Emphasis added.) Lydon's claim of evidentiary failure and a legal judgment to that effect therefore have different consequences under the Double Jeopardy Clause. We believe that the dissent in the Court of Appeals correctly described the nature of the *de novo* hearing as follows:

> "While technically [the defendant] is 'tried again,' the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more—rather than less—of the process normally extended to criminal defendants in this nation." 698 F. 2d, at 12 (Campbell, J., dissenting).

In *Burks*, the question involved the significance to be attached to a particular event—an appellate determination that the evidence was insufficient to support a conviction. Concededly, no such event has occurred here; but Lydon insists that he is entitled under the Federal Constitution to a review

of the evidence presented at the bench trial before proceeding with the second-tier trial. *Burks* does not control this very different issue, and we are convinced that the Double Jeopardy Clause does not reach so far. Consequently, we reject the suggestion that *Burks* modified *Ludwig*, and we reaffirm our holding in the latter case.[7]

IV

A number of features of the Massachusetts system persuade us that it does not constitute "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," *United States* v. *Scott*, 437 U. S. 82, 91 (1978), even when a defendant convicted at the first tier claims insufficiency of the evidence.

We note at the outset that Lydon was in "jeopardy" in only a theoretical sense. Although technically "jeopardy" under the Double Jeopardy Clause entails the "potential or risk of trial and conviction, not punishment," *Price* v. *Georgia*, *supra*, at 329, it is worthy of note that virtually nothing can happen to a defendant at a first-tier trial that he cannot avoid. He has an absolute right to obtain the *de novo* trial, and he need not allege error at the first-tier trial to do so. Once the right to a *de novo* trial is exercised, the judgment at the bench trial is "wiped out." *Mann* v. *Commonwealth*, 359 Mass. 661, 271 N. E. 2d 331 (1971).

The defendant's right to obtain *de novo* review without alleging error is significant in that it ameliorates one of the concerns underlying our opinion in *Burks*. In *Burks*, we recognized the danger of "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U. S., at 11. The Court of Appeals in this case stated that "[t]he process of judicial review

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[7] JUSTICE BRENNAN suggests that the voluntary nature of the two-tier system strongly influences his conclusion. *Post*, at 325–326, and n. 8. It is not clear why that is so, given that his reasoning is based upon the defendant's expectations, rather than a theory of waiver.

has conveniently pinpointed the evidence which was lacking, and retrial simply gives the prosecutor another opportunity to supply it." 698 F. 2d, at 8. However, the "process of judicial review" that resulted in the identification of the precise area of insufficiency is not a part of the ordinary Massachusetts procedure and would not have occurred had it not been for Lydon's double jeopardy claim and the intervention by federal courts. In the usual case, there would be no review prior to the jury trial.

A claim that our decision in this case creates an incentive for a prosecutor to hold back and learn the defendant's case in the first trial, in order to hone his presentation in the second, is unpersuasive. The prosecution has every incentive to put forward its strongest case at the bench trial, because an acquittal will preclude reprosecution of the defendant. Although admittedly the Commonwealth at the *de novo* trial will have the benefit of having seen the defense, the defendant likewise will have had the opportunity to assess the prosecution's case. Because in most cases the judge presiding at the bench trial can be expected to acquit a defendant when legally insufficient evidence has been presented, it is clear that the system provides substantial benefits to defendants, as well as to the Commonwealth.[8] In fact, as we recognized in *Ludwig* v. *Massachusetts*, 427 U. S., at 626–627, there appears to be nothing to stop a defendant from choosing a bench trial for the sole purpose of getting a preview of the Commonwealth's case to enable him to prepare better for the jury

[8] It appears that defendants recognize the advantages of two-tier systems. During one period studied, only about 9% of defendants chose a jury trial in the first instance. Moreover, thousands of cases were disposed of by convictions at bench trials because many convicted defendants did not exercise their right to appeal to the jury trial session. *Lydon* v. *Commonwealth*, 381 Mass. 356, 359, n. 5, 409 N. E. 2d 745, 748, n. 5, cert. denied, 449 U. S. 1065 (1980).

We also note the fact that the advantages of two-tier systems have led almost half of the States to adopt such systems. See 698 F. 2d 1, 2 (CA1 1982).

trial. To put the matter another way, as we observed in *Colten* v. *Kentucky*, 407 U. S. 104, 119 (1972), a defendant's chances in a two-tier system are "[i]n reality . . . to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of a judge or jury in the superior court, with sentence to be determined by the full record made in that court."

As the dissent in the Court of Appeals recognized, the two-tier system affords benefits to defendants that are unavailable in a more conventional system. 698 F. 2d, at 11–12 (Campbell, J., dissenting). In traditional systems, a convicted defendant may seek reversal only on matters of law; in the Massachusetts system a defendant is given two opportunities to be acquitted on the facts. If he is acquitted at the first trial, he cannot be retried. See *Ludwig* v. *Massachusetts*, *supra*, at 631. If he is convicted, he may then choose to invoke his right to a trial *de novo* and once again put the prosecution to its proof. If the prosecution fails in the second trial to convince the trier-of-fact of the defendant's guilt beyond a reasonable doubt, an acquittal results. If the prosecution succeeds in obtaining a conviction the second time, the defendant then has the usual appellate remedies. As we noted in *Ludwig*, "[n]othing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal."[9] 427 U. S., at 632.

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[9] Of course, under the present Massachusetts two-tier system, a defendant can also wholly avoid the consequences of a first-tier trial by avoiding the trial altogether. A defendant has an unqualified right to proceed to a jury trial in the first instance. It thus cannot be said that the Commonwealth required that Lydon submit to two trials. In this sense, the current Massachusetts system is more favorable to defendants than was the system we upheld against constitutional attack in *Ludwig* v. *Massachusetts*. There is not the slightest hint in the record that Lydon, who was represented by counsel, did not choose the bench trial voluntarily.

Although, as Judge Campbell said in dissent below, his colleagues' opinion reflects "intelligence and logic," we agree with him that their "relentless application of secondary precepts developed in other, very different settings" led to a wrong result not required by the Constitution and destructive of "a useful and fair state procedure." 698 F. 2d, at 10. Accordingly, we reverse the judgment of the Court of Appeals.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and concurring in the judgment.

I agree that, because respondent was "in custody" within the meaning of 28 U. S. C. §§ 2241(c)(3) and 2254(a) and because he had exhausted all available state remedies for his constitutional claim, the District Court had jurisdiction to entertain his habeas corpus petition. Accordingly, I join Parts I and II of the Court's opinion.[1] I analyze the merits differently than does the Court, however, and therefore do not join Parts III and IV of its opinion.

I

The Court rejects Lydon's double jeopardy claim by relying on the absence of "government oppression" and the presence of "continuing jeopardy." For many of the reasons advanced by the Court, as well as others, see *infra*, at 324–326, I completely agree that the two-tier trial option available to Massachusetts defendants appears eminently fair and reasonable and that there is therefore no evidence of the kind of "governmental oppression" that might, apart from other analytical considerations, provide an independent basis for a double jeopardy claim. I do not, however, believe—nor do I

[1] Although it appears in Part II in which I otherwise concur, I do not agree with the implications of footnote 5 of the Court's opinion. See n. 7, *infra*.

understand the Court to suggest—that the *absence* of "governmental oppression" standing alone would defeat a double jeopardy claim otherwise valid under our cases.

At first blush, Lydon appears to present such a claim. The Court assumes, as petitioners concede, "that jeopardy attached at the swearing of the first witness at Lydon's bench trial," *ante*, at 309; the Commonwealth does not claim it lacked "a fair opportunity" to present its best evidence nor does it challenge the District Court's determination, based on an application of Massachusetts decisions directly on point, that "the State had failed as a matter of law to prove its case" against Lydon, see 698 F. 2d 1, 7 (CA1 1982) (opinion below); and, finally, the Court seems to acknowledge that, as a result of today's decision, Lydon will undergo two trials, *ante*, at 309. Accordingly, Lydon appears to establish that, contrary to the rule we unanimously reaffirmed just three Terms ago, he will be subjected to "retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so." *Hudson* v. *Louisiana*, 450 U. S. 40, 45, n. 5 (1981).[2]

The Court meets this argument by noting that Lydon has only a "claim of evidentiary failure . . . [, not] a legal judgment to that effect . . . ." *Ante*, at 309. Invoking the concept of "continuing jeopardy," the Court maintains that such a "legal judgment" is required before jeopardy is "terminated" and a retrial barred. Nor, in the Court's view, is it

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[2] Lydon does not contend that the Commonwealth is required by the Federal Constitution to afford appellate review of the evidence presented at the bench trial before proceeding with the second-tier trial. See Brief for Respondent 85–90. Instead, Lydon argues that the Commonwealth violated *Burks* v. *United States*, 457 U. S. 1 (1978), by ordering him to undergo a second trial, despite what he claims was insufficient evidence at the first trial. As the Court appears to recognize, the jurisdiction of a federal habeas court to entertain such a claim does not depend on the Commonwealth's failure to provide appellate or indeed any other kind of review of the sufficiency before the second trial. The habeas court has jurisdiction as long as the defendant has exhausted whatever state remedies are in fact available. See *ante*, at 302–303.

enough for these purposes that Lydon has obtained a "legal judgment" that the evidence was constitutionally inadequate from a Federal District Court, acting within its jurisdiction and after the defendant has exhausted state remedies. Instead, Lydon's claim must be rejected because "he fails to identify any stage of the state proceedings that can be held to have terminated jeopardy." *Ante*, at 309.

I agree that a valid double jeopardy claim presupposes some identifiable point at which a first trial may be said to have ended. See *infra*, at 320. I respectfully suggest, however, that mere incantation of the phrase "continuing jeopardy," without more, partakes of the sort of "conceptual abstractions" that our decisions elaborating the requirements of the Double Jeopardy Clause have attempted to avoid. See *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). For example, although the Court holds that the Double Jeopardy Clause bars retrial after certain jeopardy-terminating "legal judgments," its approach sets no apparent limits on a State's ability to withhold the necessary "legal judgment," thereby maintaining a state of "continuing jeopardy" and justifying repeated attempts to gain a conviction. And by ignoring the realities of Lydon's situation and demanding a state-court "legal judgment" of acquittal, the Court manages to avoid grappling with the common-sense intuition that the *guilty* verdict rendered at the end of Lydon's first-tier trial constitutes an obvious point at which proceedings against him "terminated."[3]

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[3] Ultimately, the Court's decision rests on an *ipse dixit* that "[a]cquittals, unlike convictions, terminate the initial jeopardy." *Ante*, at 308. The Court nowhere explains why an acquittal marks the end of a trial while a conviction or, as in this case, a judgment that the defendant was *entitled* to an acquittal, lack that effect. Cf. *Green* v. *United States*, 355 U. S. 184, 187 (1957), quoting *Ex parte Lange*, 18 Wall. 163, 169 (1874) ("The common law not only prohibited a second punishment for the same offence, but it went further and forb[ade] a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted"). Cf. *post*, at 329–330 (STEVENS, J., con-

To the best of my knowledge, this is the first occasion on which the Court has employed the "continuing jeopardy" notion in such a formalistic fashion. Until today, we have repeatedly emphasized that the concept of "continuing jeopardy" is, at best, a label that "has occasionally been used to explain why an accused who has secured the reversal of a conviction on appeal may be retried for the same offense." *Breed* v. *Jones*, 421 U. S. 519, 534 (1975). See also *Burks* v. *United States*, 437 U. S. 1, 15 (1978); *Price* v. *Georgia*, 398 U. S. 323, 329, n. 4 (1970). But as a talismanic substitute for analysis, the "continuing jeopardy" concept "has 'never been adopted by a majority of this Court,'" *Breed* v. *Jones*, *supra*, at 534, quoting *United States* v. *Jenkins*, 420 U. S. 358, 369 (1975).

In particular, the rule allowing retrials after reversal for trial error, first announced in *United States* v. *Ball*, 163 U. S. 662, 672 (1896), has never rested on the theory that, notwithstanding a guilty verdict ending trial level proceedings, the trial never "terminated" and the defendant therefore remained in a state of "continuing jeopardy." Instead, we have grounded the *Ball* rule in "the implications of that principle for the sound administration of justice." *United*

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curring in part and concurring in judgment); *infra*, at 323–327. In any event, if in fact convictions do not terminate jeopardy, then renewed prosecution of a defendant after an unreversed conviction for the same offense—which the Court acknowledges is barred, *ante*, at 306–307—would constitute only "continuing" and not *double* jeopardy under the Court's theory. Nor, under the Court's approach, could the prohibition against such a prosecution be justified by the policy against subjecting a defendant to multiple punishments for the same offense. If a guilty verdict does not "terminate" proceedings, a convicted defendant subjected to further prosecution for the same offense is simply not "*twice* put in jeopardy" within the language of the Double Jeopardy Clause. U. S. Const., Amdt. 5 (emphasis added). See *Missouri* v. *Hunter*, 459 U. S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended").

States v. *Tateo*, *supra*, at 466. See also *Tibbs* v. *Florida*, 457 U. S. 31, 40 (1982); *United States* v. *DiFrancesco*, 449 U. S. 117, 131 (1980); *United States* v. *Scott*, 437 U. S. 82, 89–92 (1978); *United States* v. *Wilson*, 420 U. S. 332, 343–344, n. 11 (1975).[4] The opinion in *Burks* provided the fullest explanation for the *Ball* rule and also explained why that rule does not permit retrials after reversals based on insufficient evidence:

> "[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. . . .
>
> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was

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[4]The Court finds authority for its approach in the statement in *Price* v. *Georgia*, 398 U. S. 323, 329 (1970), that "[t]he concept of continuing jeopardy [is] implicit in the *Ball* case." The opinion in *Price* did not, however, approve the "broad continuing jeopardy approach," *id.*, at 328, n. 3. Indeed, as the Court notes, *ante*, at 308, *Price* suggested that, in light of modern double jeopardy cases, the conclusion represented by the "continuing jeopardy" label reflects "an amalgam of interests—*e. g.*, fairness to society, lack of finality, and limited waiver, among others." 398 U. S., at 329, n. 4. Like *Tateo*, *Jenkins*, *Breed*, *Burks*, *Scott*, *Wilson*, *DiFrancesco*, and *Tibbs*, therefore, *Price* eschewed reliance on the mere shibboleth of "continuing jeopardy."

so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Burks* v. *United States*, *supra*, at 15–16 (emphasis in original) (footnote omitted).

The decision in *Burks*, therefore, is not merely an application of an abstract concept of "continuing jeopardy." Instead, *Burks* derives from "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence"—that a "'verdict of acquittal . . . [can]not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977) (quoting *United States* v. *Ball*, *supra*, at 671). Unlike a reversal for trial error, a reversal for constitutionally insufficient evidence represents a determination that, notwithstanding the verdict to the contrary, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979), and therefore the defendant was *entitled* to a judgment of acquittal as a matter of law. In the eyes of the law, the defendant is *innocent* of the charges brought against him. The policies barring retrial after acquittal are no less applicable to such a defendant simply because he, unlike a defendant who actually obtained a judgment of acquittal, was tried before an irrational or lawless factfinder.

To be sure, the *Burks* rule is not engaged unless the conviction at the first trial is reversed and the State seeks a retrial; *Burks* forbids a retrial under those circumstances if the evidence at the first trial was constitutionally insufficient. In that respect, the Court is quite correct in stating that a prerequisite to a successful *Burks* claim is a "legal judgment" rendered at some point that the evidence was insufficient

under the standards of *Jackson* v. *Virginia*, *supra*. But the Court's "continuing jeopardy" concept begs the questions of whether and when the defendant is *entitled* to a judgment barring further proceedings.[5] For all that concept provides, the defendant in *Burks* was simply fortunate that the reviewing court *chose* to provide him with a judicial "determination that the evidence was insufficient to support a conviction," *ante*, at 309, and did not instead rely on an alternative ground of reversal. In the latter event, Burks, like Lydon, would have been left with only a "claim of evidentiary failure[, not] a legal judgment to that effect." *Ibid.* I cannot agree that the protections of the Double Jeopardy Clause depend so heavily on the grace of a reviewing court. See *infra*, at 320–321.

For these reasons, I do not find invocation of an unadorned "continuing jeopardy" concept helpful in resolving the issues posed by this case. Instead, if we are to employ the label "continuing jeopardy," I would attempt to give it content by turning to the principles and policies of the Double Jeopardy Clause that this Court has elaborated in analogous cases.

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[5] Our modern double jeopardy cases have emphasized that, absent substantial countervailing state interests such as ordinarily obtain when a conviction is reversed on grounds of trial error, "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957). See also *Tibbs* v. *Florida*, 457 U. S. 31, 39–42 (1982). Although the Court quotes the same language from *Green*, *ante*, at 307, the "continuing jeopardy" concept on which it relies, as originally set out by Justice Holmes in his dissenting opinion in *Kepner* v. *United States*, 195 U. S. 100, 134–137 (1904), entails no discernible limit on the government's ability repeatedly to retry a defendant for "the same cause":

"[I]t seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause."

II

In order "to be *twice* put in jeopardy of life or limb" for the same offense, U. S. Const., Amdt. 5 (emphasis added), a defendant facing a new trial must have been subjected to a previous proceeding at which jeopardy attached as a matter of federal constitutional law, *Crist* v. *Bretz*, 437 U. S. 28 (1978), and which has now somehow ended; in the Court's terminology, former jeopardy must have "terminated." Of course, it is not sufficient that the defendant *claims* that one proceeding has concluded and another has begun. For example, the second half of a trial does not subject a defendant to double jeopardy because his motion for a mistrial was denied in the middle of proceedings—even though the defendant asserts that, as far as he is concerned, his trial has ended. Instead, every valid double jeopardy claim presupposes some kind of predicate set of circumstances—such as those typically attendant to a verdict, judgment, or order dismissing the case—objectively concluding one trial and giving rise to the prosecution's effort to begin another.

The question of whether jeopardy has objectively "terminated" should be analyzed in terms of the policies underlying the Double Jeopardy Clause, namely, its concern that repeated trials may subject a defendant "to embarrassment, expense and ordeal and compe[l] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957). Jeopardy may be said to have terminated only when the posture of a trial in some objective sense leaves the defendant in such a position that resumption of proceedings would implicate those policies.

Hence, although in most instances a "legal judgment" undoubtedly entails the kind of circumstances under which we may easily conclude that jeopardy has terminated, it seems obvious that a State may not evade the strictures of the Clause simply by withholding a legal judgment and thereby

subjecting a defendant to retrial on the theory of "continuing jeopardy." To take two extreme examples, a trial judge, having received a jury verdict of not guilty, may not justify an order that the trial be repeated by refusing to enter a formal judgment on the jury's verdict; nor may a State with a one-tier system avoid a double jeopardy claim by refusing to acknowledge that the first trial had in fact begun and ended. These hypothetical situations, while admittedly unrealistic, nevertheless demonstrate that the determination of whether a trial has in fact "terminated" for purposes of the Double Jeopardy Clause—like the question of whether a trial has begun, *Crist* v. *Bretz*, *supra*—is an issue of federal constitutional law; it cannot turn solely on whether the State has entered a "legal judgment" ending the proceedings. Cf. *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571 ("what constitutes an 'acquittal' is not to be controlled by the form of the judge's action").

The fact that a trial has ended does not, however, complete the constitutional inquiry; the Court has concluded, most notably in applying the *Ball* rule, that strong policy reasons may justify subjecting a defendant to two trials in certain circumstances notwithstanding the literal language of the Double Jeopardy Clause. See n. 5, *supra*. The issue of whether policy reasons of that kind justify retrial in a given case is, however, analytically distinct from the question of whether the challenged proceeding constitutes a second trial or, instead, a continuation of the first. Cases applying the *Ball* rule, for instance, acknowledge that the defendant will be subjected to two trials but find that fact constitutionally permissible. *E. g.*, *United States* v. *Tateo*, 377 U. S., at 465–466.

Accordingly, once it has been determined that a trial has ended as a matter of constitutional law, a court considering a double jeopardy claim must consider the separate question of whether a second trial would violate the Constitution. For example, when a defendant challenging his conviction on ap-

peal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with the rule of *Burks* v. *United States*, 437 U. S. 1 (1978), ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict." *Tibbs* v. *Florida*, 457 U. S., at 51 (WHITE, J., dissenting). See *id.*, at 45 (majority opinion) (noting that consideration of evidentiary sufficiency before ordering retrial is part of state appellate court's "obligations to enforce applicable state and federal laws").

In short, I believe there are two distinct limitations on a State's ability to retry a defendant on a claim of "continuing jeopardy." First, the issue of whether a trial has ended so that a second trial would constitute *double* jeopardy is a federal constitutional question, informed but not controlled by the State's characterization of the status of the proceedings; resolution of that question turns essentially on the relationship between the circumstances at issue and the policies underlying the Double Jeopardy Clause. Second, once it has been determined that a first trial has in fact ended, terminating former jeopardy as a matter of federal constitutional law, a State may not place the defendant in jeopardy a second time if retrial is constitutionally barred on any grounds properly preserved and presented.[6]

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[6] The approach I have proposed is fully consistent with *Ludwig* v. *Massachusetts*, 427 U. S. 618 (1976), and indeed avoids the tension suggested in the Court's opinion between that case and *Burks* v. *United States*, 437 U. S. 1 (1978). See *ante*, at 305–306 and 309–310. As the Court notes, the opinion in *Ludwig* analogized the second-tier of trial proceedings in Massachusetts to a retrial after reversal of the conviction permissible under the *Ball* rule. 427 U. S., at 631–632. The Court did not rely on the

III

In this case, the guilty verdict rendered by the first-tier judge undeniably ended a set of proceedings in that courtroom that would be most naturally understood as a single, completed trial. Arguably, therefore, that verdict "terminated" jeopardy. If so, and if the evidence at the first trial was insufficient, then retrial of Lydon at the second tier would be constitutionally barred under *Burks*, without regard to whether the vacating of the guilty verdict, in and of itself, would otherwise permit a new trial under the *Ball* rule. And because Lydon has fully exhausted available state remedies, the federal habeas court would be fully authorized to vindicate his claim before trial or after conviction. See *ante*, at 302–303; *Arizona* v. *Washington*, 434 U. S. 497 (1978).[7]

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notion that jeopardy continued through both proceedings, rendering them a single "trial," but rather assumed, as in *Ball* itself, that the second tier constituted a "new trial." 427 U. S., at 632. There was, of course, no suggestion in *Ludwig* that such a "new trial" was barred because of the absence of constitutionally sufficient evidence—the issue presented by this case—and therefore the Court had no occasion to consider whether the guilty verdict at Ludwig's first-tier trial "terminated" jeopardy.

[7] Contrary to the Court's suggestion, Lydon *has* exhausted every available state remedy for each element of his *Burks* argument, including that argument's predicate claim that the evidence at the first trial was insufficient. In implying that the sufficiency issue is unexhausted because Lydon failed "to present his claim to the *de novo* court in precisely the manner that the Massachusetts court suggested that a double jeopardy claim should be submitted," *ante*, at 303, n. 5, the Court ignores its own earlier statement that "[b]efore the jury trial commenced, Lydon moved to dismiss the charge against him on the ground that no evidence of the element of intent had been presented at the bench trial," *ante*, at 298. Indeed, the very opinion of the Massachusetts Supreme Judicial Court announcing the proper procedure noted that Lydon had moved to dismiss the case on double jeopardy grounds before the *de novo* court, *Lydon* v. *Commonwealth*, 381 Mass. 356, 357, 366–367, 409 N. E. 2d 745, 747, 752 (1980), and, on a petition for review of the jury-trial judge's denial of that motion, agreed that "the jury trial session is the appropriate forum for consideration of double jeopardy claims asserted after a bench trial." *Id.*, at 366–367, 409

In the unique context of the Massachusetts two-tier trial system, however, I do not believe a guilty verdict at the first tier is attended by the type of circumstances that can be said to "terminate" trial-level proceedings against Lydon for purposes of the Double Jeopardy Clause. In terms of the policies advanced by the Clause, that verdict has substantially less significance for the defendant than it would have in a traditional, one-tier system. See generally *Colten* v. *Kentucky*, 407 U. S. 104 (1972). In the latter context, a defendant has no right to insist on two opportunities to prove his case and rebut the prosecution's. Although there ultimately may be two trials, as when a conviction is reversed on appeal for trial error, that eventuality is largely beyond the defendant's control. A defendant will therefore ordinarily approach a trial on the assumption that it will be his only opportunity to influence the factfinder in his favor. That expectation will presumably result in a maximum dedication of the defendant's resources to the trial, which in turn will engender a significant degree of anxiety during the course of proceedings.

In contrast, as the dissenting judge in the Court of Appeals pointed out, Lydon chose to be tried in a system the defining characteristic of which is that it provides the defendant "two full opportunities to be acquitted *on the facts*." 698 F. 2d, at 11 (Campbell, J., dissenting) (emphasis in original). Unlike a defendant in a traditional trial system, a defendant in Lydon's position knows from the outset of the first-tier proceeding that, at its conclusion, he can demand a chance to convince a second factfinder that he is innocent. This knowledge permits him to adopt in advance a trial strategy based on that opportunity. He can, for example, withhold some of his stronger evidence with the intention of introducing it at

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N. E. 2d, at 752. Accordingly, the Court's effort to avoid the conclusion that *Jackson* v. *Virginia*, 443 U. S. 307 (1979), authorized the federal habeas court to consider the sufficiency of the evidence at Lydon's first trial is unavailing.

the second tier after evaluating the prosecution's entire case; in addition, he can take risks in his presentation, secure in the knowledge that he can avoid any resulting dangers the second time around. Perhaps more importantly, the defendant's realization throughout the first-tier trial that he has an absolute right to a second chance necessarily mitigates the sense of irrevocability that normally attends the factfinding stage of criminal proceedings, from beginning to end. For these reasons, the defendant's prospective knowledge of his entitlement to a second factfinding opportunity substantially diminishes the burden imposed by the first proceeding as well as the significance of a guilty verdict ending that proceeding.

Furthermore, the strategic advantage gained by a defendant who chooses the two-tier system is enhanced by virtue of the fact that the prosecution does not share an equivalent advantage. As the Court notes, the "prosecution has every incentive to put forward its strongest case at the bench trial, because an acquittal will preclude reprosecution of the defendant." *Ante*, at 311. The Court also notes that "[a]lthough admittedly the Commonwealth at the *de novo* trial will have the benefit of having seen the defense, the defendant likewise will have had the opportunity to assess the prosecution's case." *Ibid.* Of course, both of these points could be advanced to justify the retrial of a defendant who has been convicted in a traditional system and who has not appealed—a practice prohibited under the Double Jeopardy Clause. See *ante*, at 306–307. What distinguishes the Massachusetts system for me, however, is that it permits but does not compel a defendant to secure the advantage of knowing in advance that he, but not the prosecution, may demand a second factfinding opportunity.[8] That advantage substantially re-

[8] Of course the features of the two-tier system that I have identified might not be advantageous to every defendant; indeed, the nature of a case or the strength of the government's evidence may be such that those characteristics could prove undesirable or unfair to the defendant. Ac-

duces the significance of the circumstances surrounding a guilty verdict concluding the first-tier to the point that I conclude that such a verdict does not "terminate" jeopardy.

This conclusion is unaffected by Lydon's claim that earlier Massachusetts cases led him to believe that he could challenge the sufficiency of the evidence presented at the first-tier trial through a motion to dismiss filed at the outset of the second-tier. See Brief for Respondent 55. Cf. *post*, at 331–332, n. 2 (STEVENS, J., concurring in part and concurring in judgment). Assuming the authoritativeness of those cases and Lydon's reasonable reliance on them, the Commonwealth's failure to provide a promised avenue of relief might amount to a violation of due process. The prospect of such a remedy does not, however, bear on whether the circumstances surrounding a guilty verdict at the end of the first tier "terminated" proceedings for purposes of the Double Jeopardy Clause. Faced with a charge for which he believes the prosecution has constitutionally insufficient evidence, a defendant in Lydon's position can choose the ordinary one-tier system in the expectation that, if his sufficiency claim is sustained, he will never be required to undergo a second trial under *Burks*. A decision to select the two-tier system instead necessarily achieves the advantages flowing from the knowledge that he can demand a second factfinding opportunity. Even if that choice is made only as a hedge against the possibility that the insufficiency claim will be rejected by every court the defendant believes can entertain it, selec-

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cordingly, I find it significant that those aspects of the Massachusetts two-tier system that depart from a traditional trial are not forced on the defendant. Because the Commonwealth permits a defendant to decide for himself whether to accept the burdens of the two-tier proceeding in exchange for its benefits, I need not decide whether a system that allows no such choice would also survive constitutional scrutiny. Cf. *Ludwig* v. *Massachusetts*, 427 U. S., at 632 (STEVENS, J., dissenting). See also *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972).

tion of the two-tier alternative itself clearly diminishes both the strategic and emotional significance of the guilty verdict at the first tier.

For these reasons, I conclude that the guilty verdict rendered at the end of Lydon's bench trial did not, for purposes of the Double Jeopardy Clause, "terminate" one trial and thereby permit a claim that a second trial was barred due to insufficient evidence. Accordingly, I agree that the federal habeas court erred in sustaining Lydon's claim on the merits and therefore join the judgment of the Court.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

I agree with JUSTICE O'CONNOR that there is no federal habeas corpus jurisdiction. I continue to believe that *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), was wrongly decided for the reasons indicated by the dissent in that case. But accepting *Hensley* as the law—as I do—there is no reason to extend it to find that Lydon was in "custody" when he is free on his own recognizance. As JUSTICE O'CONNOR explains, *Hensley* is best understood as interpreting "custody" to include those cases where a criminal defendant, already convicted and sentenced, would be imprisoned without further state judicial action had not the prison sentence been stayed by the federal court on habeas. The State had "emphatically indicated its determination to put [Hensley] behind bars," *id.*, at 351–352, and would have done so but for a stay by the Federal District Court.

Lydon's petition does not present such a case. Until Lydon is convicted, he is obligated only to appear at trial and to "keep the peace." If the trial court finds that he has defaulted on his recognizance, the court may sentence him pursuant to his first conviction; but Lydon then may seek appellate review, see, *e. g.*, *Commonwealth* v. *Bartlett*, 374 Mass. 744, 374 N. E. 2d 1203 (1978). It trivializes habeas

corpus jurisdiction, historically a protection against governmental oppression, to use it as a remedy against restraints as petty as those to which Lydon is subject.

However, as the Court chooses a different tack, I address the merits as well and join Parts I, II–B, III, and IV of JUSTICE WHITE's opinion.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

It is necessary to analyze the character of the substantive claim made by respondent before addressing the more difficult procedural questions. Properly analyzed, respondent's habeas corpus petition raises two distinct constitutional claims: First, whether the entry of a judgment of guilt at the conclusion of his first-tier trial deprived him of liberty without due process of law because the evidence was constitutionally insufficient, and second, whether the second-tier trial, if held before the first question is answered, would violate Lydon's constitutional right not to be twice placed in jeopardy for the same offense.

The answer to the first question is easy. If, as respondent alleged and the District Court found, the Commonwealth's evidence at respondent's first-tier trial was insufficient to support a finding of guilt in the first-tier trial, he was entitled to an acquittal. Such an acquittal would have given respondent his unconditional freedom. Instead, he was found guilty of a crime and sentenced to two years in jail. It is true, of course, that Massachusetts has afforded him a right to have that judgment vacated, but as the Court has demonstrated, that relief does not terminate his custodial status *Ante*, at 300–302. As a matter of federal constitutional law, he had a right to a judgment of acquittal that would eliminate the restraints on his liberty. The Due Process Clause does not permit a State to deprive a person of liberty based on a finding of guilt beyond reasonable doubt after a proceeding in which it failed to adduce sufficient evidence to persuade any

trier of fact of guilt beyond reasonable doubt. *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Therefore, respondent's continued custody constitutes a deprivation of liberty without due process of law.

The answer to the second question is more difficult. Petitioners concede and the Court assumes that jeopardy attached at the swearing of the first witness at respondent's first-tier trial. *Ante*, at 309; see also *ante*, at 314 (BRENNAN, J., concurring in part and concurring in judgment). The question then becomes whether the Commonwealth now seeks to place respondent in jeopardy a second time. The Court and JUSTICE BRENNAN seem to state that had respondent been acquitted at his first-tier trial, the Constitution would prohibit the second-tier trial. *Ante*, at 308; *ante*, at 318 (BRENNAN, J., concurring in part and concurring in judgment). There is also common ground on the proposition that a judgment of acquittal is a necessary precondition to the success of respondent's double jeopardy claim. The Court says that an acquittal would "terminate" jeopardy; thus a second trial would constitute a new and therefore second and unconstitutional attachment of jeopardy, *ante*, at 308–309. JUSTICE BRENNAN writes that once a judgment of acquittal is obtained the Constitution prohibits retrial, and frames the question as whether respondent was entitled to such a judgment prior to his second trial, *ante*, at 317–319.

What makes this case difficult is that the first-tier trial actually ended with a judgment of conviction. Respondent does not rely on that judgment as the bar to the second-tier trial. Instead, the predicate for his double jeopardy claim is a hypothetical judgment that he contends should have been entered at the end of the first trial. I agree with JUSTICE BRENNAN that the Court's use of the concept of "continuing jeopardy" is unhelpful, and that the underlying issue in this case is whether respondent is constitutionally entitled to a judgment of acquittal that could form the predicate for his double jeopardy claim. *Ante*, at 313–319. To

put it another way, until a judgment of acquittal is entered—or until there is an adjudication establishing his right to such a judgment—respondent's double jeopardy claim is premature.

The central procedural question the case presents, therefore, is when, if ever, is respondent entitled to have his first constitutional claim—that he was denied due process as a result of the first-tier trial—adjudicated. This Court, like the Supreme Judicial Court of Massachusetts, answers this question "never." I disagree. If, as I suggest above, respondent's current custody is in violation of the Due Process Clause, then respondent has a due process claim cognizable on federal habeas review under *Jackson*. If this claim is sustained by the federal habeas court, as it was here, that judgment would provide the predicate for respondent's double jeopardy claim. Such a judgment by the federal habeas court would fall under the rule of *Burks* v. *United States*, 437 U. S. 1 (1978). What we said of an appellate court's reversal of a jury verdict there would apply equally to a federal habeas court's judgment that the Commonwealth's evidence at the first-tier trial was insufficient:

> "[A]n appellate reversal means that the government's case was so lacking that it should not have been even *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Id.*, at 16 (emphasis in original).[1]

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[1] See also *Tibbs* v. *Florida*, 457 U. S. 31, 41 (1982) ("A verdict of not guilty whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant").

In short, if Massachusetts affords respondent no remedy, I believe a federal court must adjudicate respondent's *Jackson* claim, and, if it is sustained, provide habeas corpus relief in the form of an order that requires the State to enter, *nunc pro tunc*, the judgment of acquittal to which respondent is constitutionally entitled. If and when such a judgment of acquittal is entered, that judgment would bar a second prosecution for the same offense. Or, if the second prosecution had already been concluded before the judgment of acquittal was entered, any jeopardy associated with the second proceeding would be foreclosed; even if the prosecutor had adduced additional evidence at the second-tier trial, the second judgment could not survive the preclusive effect of the acquittal even though it was belatedly entered.[2]

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[2] JUSTICE BRENNAN resists this conclusion in "the unique context of the Massachusetts two-tier trial system" because respondent selected this system and received certain tactical advantages as a result of that decision. *Ante*, at 324. However, the tactical advantages JUSTICE BRENNAN discusses would be entirely illusory if respondent could be convicted even if the Commonwealth adduced insufficient evidence against him at the first-tier trial. The Massachusetts system is only fair to defendants if it acquits those who deserve acquittal. We do not know whether respondent would have selected this system had he known that he had no right to be acquitted at his first-tier trial even if the Commonwealth's evidence was incapable of persuading any rational trier of fact of his guilt. Surely respondent did not validly waive his right to be acquitted under those circumstances in the sense of intentionally relinquishing a known right, which is what the Constitution requires. See *Green* v. *United States*, 355 U. S. 184, 191–192 (1957). See also *Burks* v. *United States*, 437 U. S. 1, 17 (1978). Respondent's right to an acquittal if there was a failure of proof at the first-tier trial must be enforced if the *quid pro quo* which JUSTICE BRENNAN believes validates the Massachusetts system is to be realized. Moreover, if, as petitioners concede and the Court and JUSTICE BRENNAN assume, jeopardy attached when the first witness at respondent's first-tier trial was sworn, double jeopardy would operate to prevent the second-tier trial under JUSTICE BRENNAN's own analysis of the case. As he explains, *ante*, at 315–318, the Double Jeopardy Clause has been construed to permit jeopardy to "continue" only when there has not been a failure of proof at the

This reasoning leads me to what I regard as the most difficult issue in the case—not whether there should be federal review of Lydon's claim, but rather, when that review should take place. In answering that question, it is important to keep in mind the precise issue that the federal court must address. That issue is not, as the Court suggests, whether "Lydon could be retried *de novo* without any judicial determination of the sufficiency of the evidence at his prior bench trial." *Ante*, at 303 (footnote omitted). The judge who presided at the first trial did make such a "judicial determination" that the evidence was sufficient. Lydon claims that the determination was erroneous—indeed that the evidence was constitutionally insufficient—but he cannot deny that there was such a judicial determination. What is at issue is whether respondent is entitled to review of the constitutional sufficiency of the prosecutor's evidence under *Jackson* v. *Virginia* prior to his second-tier trial.

I join the judgment because I believe it was inappropriate for the District Court to entertain respondent's *Jackson* claim prior to his second-tier trial. The disruption of orderly state processes attendant to the exercise of federal habeas jurisdiction when state proceedings remain pending weighs strongly, and in my view decisively, against the exercise of jurisdiction.

"This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly

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first trial. See *Burks*, 437 U. S., at 15–16. Here there has been a failure of proof, and hence, as *Burks* and JUSTICE BRENNAN explain, no legitimate interest in retrial. Without a valid reason to "continue" jeopardy, the Commonwealth cannot constitutionally subject respondent to continued criminal proceedings. Finally, if the Commonwealth convicted respondent on insufficient evidence at the first-tier trial, that trial was fundamentally unfair and the continued deprivation of respondent's liberty is violative of due process. We have refused to tolerate fundamentally unfair first-tier trials simply because a fair trial will be provided at the second-tier. See *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61–62 (1972) (availability of trial *de novo* does not cure bias of judge at first-tier trial).

administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Francis* v. *Henderson*, 425 U. S. 536, 539 (1976). For example, we have held that federal courts should not exercise habeas jurisdiction when the petitioner has failed to comply with state simultaneous-objection rules, because of the weighty state interests underlying enforcement of such rules. See *Engle* v. *Isaac*, 456 U. S. 107 (1982); *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

One of the weightiest of state interests is that favoring speedy, efficient, and uninterrupted disposition of criminal cases. Because of this critical state interest, we have held that federal courts should abstain from exercising their jurisdiction when the effect thereof would be to disrupt ongoing state proceedings. See, *e. g.*, *Hicks* v. *Miranda*, 422 U. S. 332, 349 (1975); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 599–601 (1975); *Perez* v. *Ledesma*, 401 U. S. 82, 84–85 (1971); *Younger* v. *Harris*, 401 U. S. 37, 41–45 (1971).

Similarly, the statutory exhaustion requirement found in the habeas statute, 28 U. S. C. § 2254, reflects a recognition that federal habeas courts should not disrupt ongoing state proceedings. See *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982). Indeed, in our leading case concerning the propriety of pretrial federal habeas intervention under the exhaustion doctrine, we cautioned that such review would be inappropriate when it threatens to disrupt pending state proceedings and orderly state processes. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484, 490–493 (1973). Thus, the habeas statute itself reflects this concern with disrupting ongoing state proceedings.[3]

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[3] I am not suggesting that respondent's double jeopardy claim has not been exhausted; I agree that it has been for the reasons stated in Part II–B of the opinion of the Court. However, while that claim has been exhausted, it would nevertheless be meritless unless the antecedent *Jackson* claim may also be entertained by the federal habeas court. As to that claim it is true that in a technical sense respondent may well have no state

The state interest against disruption of ongoing proceedings is squarely implicated by the exercise of federal habeas jurisdiction over this case. Respondent was convicted at his first-tier bench trial on November 20, 1979, and his second-tier jury trial was originally set for November 29. That trial has been delayed for over four years. While some of that delay has been attributable to litigation in the state courts, over three years' worth of delay is attributable to federal habeas review.[4]

If we were to uphold the exercise of federal habeas jurisdiction here, similar delays could become routine in Massachusetts. Already there are some 14,000 cases a year taken to the second-tier jury trial. In virtually all of these cases, the defendant could seek federal habeas review at the conclusion of the first trial, claiming that the evidence used to convict him was insufficient. Defendants have every incentive to seek habeas review, not only to delay eventual

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remedy to exhaust inasmuch as the Massachusetts courts have indicated that they will not review respondent's *Jackson* claim even after his second-tier trial. See *ante*, at 322–323, n. 6 (BRENNAN, J., concurring in part and concurring in judgment). However, even if there has been exhaustion in a technical sense here, the more fundamental policies underlying the exhaustion requirement may be jeopardized if a habeas petition is entertained while state proceedings remain pending. After all, exhaustion was originally a judge-made rule designed not as a technical doctrine but rather to prevent premature and unjustified interference in state proceedings. See, *e. g.*, *Ex parte Hawk*, 321 U. S. 114, 116–118 (1944) *(per curiam)*; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17–19 (1925); *Davis* v. *Burke*, 179 U. S. 399, 402–403 (1900); *Ex parte Royall*, 117 U. S. 241, 251–252 (1886).

[4] This case was pending approximately seven months in the District Court, and in the Court of Appeals about another seven months. By this observation I intend no criticism of these courts. If anything, both courts disposed of the case with more than reasonable promptness. Rather, I make this observation to demonstrate the inevitable delay whenever federal habeas review is commenced, even if the case is adjudicated with commendable dispatch.

punishment, but to obtain leverage in plea negotiations.[5] The speed and efficiency of the process would quickly be eroded if collateral litigation intervened between the first and second trials. The wholesale disruption of pending proceedings that would occur if federal habeas review were available between the first and second trials to every defendant who thought the evidence of his guilt was insufficient counsels strongly against the exercise of such jurisdiction.[6] The state process should be permitted to proceed in an uninterrupted fashion before federal habeas review comes into play.

The postponement of review in this case would not render petitioner's double jeopardy claim entirely nugatory. First, if respondent's claim is meritorious, under my view, he would ultimately obtain relief from his conviction through federal habeas review after state proceedings are complete. Moreover, if his claim is meritorious, respondent will likely be acquitted at his second-tier trial precisely because of the insufficiency of the Commonwealth's evidence. It is true, of course, that the prosecutor may supply proof of an element of the offense that was omitted in the first trial. It is reasonable to assume, however, that in most of the relatively simple

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[5] I have no doubt that if we approved the exercise of habeas jurisdiction in this case, the district judges in Massachusetts would attempt to minimize disruption by adjudicating habeas cases as quickly as possible. Nevertheless, the quality of justice in such a harried process is bound to suffer. Moreover, the district judges in Massachusetts, as elsewhere, have enough burdens with which they must cope without the additional time pressure created by "interlocutory" habeas cases such as this one.

[6] Respondent and the Court of Appeals suggest that habeas review could be limited to cases in which the petitioner could make a strong initial showing of a likely constitutional violation. Nevertheless, every defendant could attempt to make such a showing in the few days between the first- and second-tier trials. Such hurry-up litigation will burden prosecutors and courts, reduce the quality of justice, and surely prove impractical (it will certainly take more than a few days just to obtain the record and transcribe the recording of the first-tier trial), forcing the state system to delay until the federal case can be adjudicated.

misdemeanor prosecutions that employ this procedure, the same evidence will again be offered and the same issue will again be presented to the second judge as to the first. The likelihood that the substance of respondent's claim will be heard and vindicated at his impending trial argues all the more strongly against federal intervention at this point in the proceedings.[7]

Second, if my view were to prevail, state prosecutors would be aware that the sufficiency of the evidence at the first-tier trial would eventually be reviewed, and they would therefore have a greater incentive to adduce sufficient evidence at that trial. Thus, the ultimate availability of federal collateral review would reduce the likelihood of a constitutional violation.

Finally, as the Court explains, *ante*, at 310–312, the Massachusetts two-tier trial system is not an especially harsh one. By voluntarily electing that procedure, the defendant has accepted the risk of two trials when he could insist upon only one. While this election cannot justify a refusal to provide any remedy for a constitutional violation, it does indicate that the enforcement of the exhaustion requirement in this case would not place upon respondent an entirely unavoidable obligation to endure two trials.

On balance I think the principles of comity that underlie the exhaustion and abstention doctrines make the exercise of federal habeas jurisdiction in this case premature. The state interest in avoiding wholesale disruption of its criminal process requires a federal habeas court to postpone the exercise of its jurisdiction over this case until after the second-tier trial has been completed. I would hold that in order to assert his constitutional claims, respondent must first take advantage of the opportunity the State provides him for an

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[7] In this case the District Court's findings indicate that the essential problem with the Commonwealth's case is that respondent was charged with the wrong offense. That problem cannot be remedied simply by adducing additional evidence at the second-tier trial.

acquittal in the second trial. If he is convicted in that proceeding, I would hold that a federal court may then review the record of the first trial to determine whether he was constitutionally entitled to an acquittal. If the record should then support the claim that respondent has made, I would conclude that he is entitled to release even if the State adduced enough additional evidence at the second-tier trial to support a conviction. Accordingly, I concur in Parts I and II of the Court's opinion and in the judgment.

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be reversed. Unlike the Court, however, I conclude that the District Court lacked jurisdiction to hear respondent Lydon's habeas petition at this stage in the ongoing state-court proceeding.

The Court suggests that federal habeas jurisdiction exists whenever (i) a state defendant is subject to minimal legal restraints on his freedom and (ii) the defendant has exhausted state avenues of relief with respect to the particular federal claim brought to the habeas court. Then, recognizing that its unadorned test might greatly expand federal habeas jurisdiction, the Court, *ante*, at 302, emphasizes "the unique nature of the double jeopardy right." In my view the Court first unnecessarily expands the holding in *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), and then limits the damage by restricting its exhaustion analysis to double jeopardy claims. I would prefer to search for a more principled understanding of the statutory term "custody."

Under Massachusetts law, as I read it, Lydon is no longer in custody "pursuant" to the judgment entered at his first trial. Lydon has invoked his right to a second trial and appeared at the second proceeding. Under Massachusetts law, therefore, the results of the first trial—together with any incidental "custody" imposed in consequence of that trial—have already been eliminated. The restraints on Lydon's freedom now derive not from the prior conviction, but from the fact

that a new criminal proceeding is in progress. Every state defendant who fails to attend a criminal trial risks punitive sanctions not dissimilar to those to which Lydon is currently exposed.

Federal habeas jurisdiction plainly does not attach merely because a state criminal defendant, whose freedom to come and go as he pleases is limited in some way in connection with a criminal proceeding, has exhausted state interlocutory review of a particular federal claim. Federal habeas jurisdiction is absent because "custody" in connection with an ongoing trial is usually not "in violation of the Constitution or laws or treaties of the United States," 28 U. S. C. §§ 2241(c)(3), 2254(a), even when the proceedings themselves or the underlying charge are constitutionally defective. Most constitutional rights exist to protect a criminal defendant from *conviction*—not from the process of trial itself.

In this regard, however, I agree with the Court that double jeopardy is different. Here, custody incident to a trial may violate the Constitution because the trial itself, regardless of its outcome, is unconstitutional. For this reason I agree that a prisoner who is incarcerated in connection with a criminal proceeding is "in custody in violation of the Constitution," 28 U. S. C. § 2254(a), when the proceeding violates his double jeopardy rights. Cf. *Arizona* v. *Washington*, 434 U. S. 497 (1978). But I do not agree that the minor restraints on Lydon's freedom, incurred in connection with an ongoing state trial, satisfy the jurisdictional requirements of the habeas statute. Nor do I believe that *Hensley* dictates a different result.

In *Hensley* the Court made it quite clear that a relaxed definition of "custody" was accepted only because incarceration was imminent and, absent federal intervention, inevitable. The habeas petitioner in *Hensley* had exhausted "all available state court opportunities to have [his] conviction set aside," 411 U. S., at 353; see also *id.*, at 346, 347, and n. 4, 351, 352, not merely all available court opportunities to review the par-

ticular claim in question. *Hensley* emphasized that the typical restrictions on freedom attending a release on personal recognizance would not, standing alone, constitute "custody" within the meaning of the habeas statute. Such restraints amount to "custody" only when state judicial proceedings have been completed and incarceration has become a purely executory decision. *Hensley* accepted a liberal definition of "custody" only in conjunction with an unusual requirement of absolute exhaustion—exhaustion not of the particular claim in question, cf. 28 U. S. C. § 2254(b), but of all possible state avenues of relief from the conviction.

My reading of *Hensley* thus leads me to conclude that a state criminal defendant should be considered "in custody pursuant to the judgment of a State court," 28 U. S. C. § 2254(a), only when he is under physical restraint, cf. *Arizona* v. *Washington*, *supra*, or under a legal restraint that can be converted into physical restraint without a further judicial hearing.* The latter situation will normally arise only when state judicial proceedings (as distinguished from particular claims raised in those proceedings) have been entirely exhausted.

Lydon's condition clearly does not meet the *Hensley* test as I understand it. Lydon has not come close to exhausting state opportunities to have the conviction set aside. Lydon cannot be incarcerated without a further judicial hearing. His position is thus functionally indistinguishable from that of a defendant pressing an interlocutory appeal. One claim may have been exhausted, but others have not. In these circumstances, incarceration is far from inevitable, and the minor constraints that attend a release on personal recognizance are much less significant. If Massachusetts stood ready to incarcerate Lydon on the basis of the conviction at the first trial my view of the case would be different.

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*Even if the habeas petitioner is in physical custody, it may well be appropriate for a federal court to abstain from deciding the petition until state-court proceedings have been completed.

The Court makes clear, *ante*, at 302–303, its view that double jeopardy claims are "unique" for federal habeas purposes. This might be sufficient reason to bring such a claim within *Hensley*'s rationale even when only the specific claim has been exhausted. Cf. *Abney* v. *United States*, 431 U. S. 651 (1977); *Arizona* v. *Washington*, *supra*; *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484 (1973). For my part, I would prefer to avoid relaxing *Hensley*'s clear holding that the minimal constraints of a release on personal recognizance constitute "custody" only when the State stands ready to incarcerate the habeas petitioner without further judicial hearing. A special purpose jurisdictional exception for double jeopardy allegations seems inadvisable simply because the habeas statute contains no license for such an exception. "Custody" is the touchstone relied on by § 2254; of all the possible unconstitutional infringements on personal freedom, only unlawful "custody" has been identified as providing a sufficient basis for federal intervention. I would therefore hold that a state criminal defendant is not "in custody pursuant to the judgment of a State court" while he remains free from physical restraint and the State remains unable to impose such restraint without a further judicial hearing.

Syllabus

JAMES *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 82–6840. Argued February 28, 1984—Decided April 18, 1984

In petitioner's criminal trial in a Kentucky state court, the judge overruled defense counsel's request that "an admonition be given to the jury that no emphasis be given to the defendant's failure to testify." Petitioner was convicted, and on appeal he argued that the trial judge's refusal to charge the jury as requested violated *Carter* v. *Kentucky*, 450 U. S. 288, which held that, in order fully to effectuate the right to remain silent, a trial judge must, if requested to do so, instruct the jury not to draw an adverse inference from the defendant's failure to testify. Conceding that *Carter* requires the trial judge, upon request, to give an appropriate instruction, the Kentucky Supreme Court held that the trial court properly denied petitioner's request because there was a "vast difference" under Kentucky law between an "admonition" and an "instruction," and petitioner, who would have been entitled to an "instruction," had requested only an "admonition."

Held:

1. In the circumstances of this case, the failure to respect petitioner's constitutional rights is not supported by an independent and adequate state ground. Pp. 344–351.

(a) Kentucky generally distinguishes between "instructions"—which tend to be statements of black-letter law setting forth the legal rules governing the outcome of a case—and "admonitions"—which tend to be cautionary statements regarding the jury's conduct, such as statements requiring the jury to disregard certain testimony. However, the substantive distinction between admonitions and instructions is not always clear or closely hewn to, and their content can overlap. Nor is there strict adherence to the practice of giving admonitions orally only while giving instructions in writing as well. Pp. 345–348.

(b) For federal constitutional purposes, petitioner adequately invoked his substantive right to jury guidance, and Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights. To insist on a particular label for the statement to the jury required by *Carter* would "force resort to an arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320, and would further no perceivable state interest. Pp. 348–349.

(c) This is not a case, as asserted by the State, of a defendant attempting to circumvent, as a matter of deliberate strategy, a firm state procedural rule that instructions be in writing. The record reveals little to support the State's view of petitioner's request, a single passing reference to an "admonition" being far too slender a reed on which to rest the conclusion that petitioner insisted on an oral statement and nothing else. Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here. Pp. 349–351.

2. Evaluation of the State's contention that any *Carter* error here was harmless is best made in state court before it is made in this Court. Pp. 351–352.

647 S. W. 2d 794, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting statement, *post*, p. 352. MARSHALL, J., took no part in the decision of the case.

C. Thomas Hectus argued the cause and filed a brief for petitioner.

Penny R. Warren, Assistant Attorney General of Kentucky, argued the cause for respondent. With her on the brief were *David L. Armstrong*, Attorney General, and *Robert L. Chenoweth*, Assistant Deputy Attorney General.

JUSTICE WHITE delivered the opinion of the Court.

In *Carter* v. *Kentucky*, 450 U. S. 288 (1981), we held that a trial judge must, if requested to do so, instruct the jury not to draw an adverse inference from the defendant's failure to take the stand. In this case, the Kentucky Supreme Court found that the trial judge was relieved of that obligation because defense counsel requested an "admonition" rather than an "instruction."

I

Petitioner Michael James was indicted for receipt of stolen property, burglary, and rape.[1] James had been convicted of

[1] The charges grew out of three separate incidents, all involving Donna Richardson. Richardson testified that on April 23, 1980, her house was broken into and a gun taken from under her pillows. A week later, she

two prior felonies—forgery and murder—and the prosecution warned that were James to take the stand it would use the forgery conviction to impeach his testimony. During *voir dire*, defense counsel asked the prospective jurors how they would feel were James not to testify. After a brief exchange between counsel and one member of the venire, the trial judge interrupted, stating: "They have just said they would try the case solely upon the law and the evidence. That excludes any other consideration." App. 30.[2] With that, *voir dire* came to a close. James did not testify at trial.

At the close of testimony, counsel and the judge had an off-the-record discussion about instructions. When they returned on the record, James' lawyer noted that he objected to several of the instructions being given, and that he "requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled." *Id.*, at 95.[3] The judge then instructed the jury,

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came home to find that a pane of glass had been removed from her back door, the locks undone, and her pillows messed up. On May 6, James, her next-door neighbor, asked to use her telephone to call a doctor. When Richardson let him in and began dialing, he put a gun to her side, tied her up, brought her to his house, and raped her.

James had the stolen pistol in his possession when arrested, hence the charge of receiving stolen property. His fingerprint was found on the missing pane of glass, hence the charge of burglary.

[2] We rejected similar logic with regard to the instructions themselves in *Carter* v. *Kentucky*, 450 U. S. 288 (1981):

"Kentucky also argues that in the circumstances of this case the jurors knew they could not make adverse inferences from the petitioner's election to remain silent because they were instructed to determine guilt 'from the evidence alone,' and because failure to testify is not evidence. The Commonwealth's argument is unpersuasive. Jurors are not lawyers; they do not know the technical meaning of 'evidence.' They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence." *Id.*, at 303–304.

[3] The relevant portion of the transcript reads, in its entirety, as follows:

"JUDGE MEIGS: Call your witness. You have closed, I am sorry.

[Footnote 3 is continued on p. 344]

which returned a verdict of guilty on all counts. At a subsequent persistent felony offender proceeding, the jury sentenced James to life imprisonment in light of his two previous convictions.

On appeal, James argued that the trial judge's refusal to tell the jury not to draw an adverse inference from his failure to testify violated *Carter* v. *Kentucky*, *supra*. The Kentucky Supreme Court conceded that *Carter* requires the trial judge, upon request, to instruct the jury not to draw an adverse inference. 647 S. W. 2d 794, 795 (1983). The court noted, however, that James had requested an admonition rather than an instruction, and there is a "vast difference" between the two under state law. He "was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." *Id.*, at 795–796. We granted certiorari, 464 U. S. 913 (1983), to determine whether petitioner's asserted procedural default adequately supports the result below. We now reverse.

II

In *Carter* we held that, in order fully to effectuate the right to remain silent, a trial judge must instruct the jury not to draw an adverse inference from the defendant's failure to testify if requested to do so. James argues that the essence of the holding in *Carter* is that the judge must afford some form of guidance to the jury, and that the admonition he

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"MR. PEALE [defense counsel]: We have closed and has *[sic]* a matter in regards to the instructions.

"OFF THE RECORD.

"MR. PEALE: Note that the defendant objects to several of the instructions being given to the jury.

"JUDGE MEIGS: Overruled.

"MR. PEALE: The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

"JUDGE MEIGS: Ladies and gentlemen of the jury, these are your instructions. . . ." Tr. of Hearing (Jan. 19, 1982), pp. 3–4.

sought was the "functional equivalent" of the instruction required by *Carter*. The State responds that the trial judge was under no obligation to provide an admonition when under Kentucky practice James should have sought an instruction. An examination of the state-law background is necessary to understand these arguments.

A

Kentucky distinguishes between "instructions" and "admonitions." The former tend to be statements of black-letter law, the latter cautionary statements regarding the jury's conduct. See generally *Webster* v. *Commonwealth*, 508 S. W. 2d 33, 36 (Ky. App.), cert. denied, 419 U. S. 1070 (1974); *Miller* v. *Noell*, 193 Ky. 659, 237 S. W. 373 (App. 1922). Thus, "admonitions" include statements to the jury requiring it to disregard certain testimony, *Perry* v. *Commonwealth*, 652 S. W. 2d 655, 662 (Ky. 1983); *Stallings* v. *Commonwealth*, 556 S. W. 2d 4, 5 (Ky. 1977), to consider particular evidence for purposes of evaluating credibility only, *Harris* v. *Commonwealth*, 556 S. W. 2d 669, 670 (Ky. 1977); *Lynch* v. *Commonwealth*, 472 S. W. 2d 263, 266 (Ky. App. 1971), and to consider evidence as to one codefendant only, *Ware* v. *Commonwealth*, 537 S. W. 2d 174, 177 (Ky. 1976). The State Rules of Criminal Procedure provide that at each adjournment the jury is to be "admonished" not to discuss the case. Ky. Rule Crim. Proc. 9.70 ("Admonition"). See generally 1 J. Palmore & R. Lawson, Instructions to Juries in Kentucky 16–20, 397–404 (1975) (hereinafter Palmore).

Instructions, on the other hand, set forth the legal rules governing the outcome of a case. They "state what the jury must believe from the evidence . . . in order to return a verdict in favor of the party who bears the burden of proof." *Webster* v. *Commonwealth*, *supra*, at 36. The judge reads the instructions to the jury at the end of the trial, and provides it a written copy. Ky. Rule Crim. Proc. 9.54(1). After *Carter*, Kentucky amended its Criminal Rules to

provide that, if the defendant so requests, the instructions must state that he is not compelled to testify and that the jury shall not draw an adverse inference from his election not to. Rule 9.54(3).[4]

The substantive distinction between admonitions and instructions is not always clear or closely hewn to. Kentucky's highest court has recognized that the content of admonitions and instructions can overlap. In a number of cases, for example, it has referred to a trial court's failure either to instruct *or* to admonish the jury on a particular point, indicating that either was a possibility. *E. g.*, *Caldwell* v. *Commonwealth*, 503 S. W. 2d 485, 493–494 (1972) ("instructions" did not contain a particular "admonition," but the "failure to admonish or instruct" was harmless); *Reeves* v. *Commonwealth*, 462 S. W. 2d 926, 930, cert. denied, 404 U. S. 836 (1971). See also *Bennett* v. *Horton*, 592 S. W. 2d 460, 464 (1979) ("instructions" included the "admonition" that the jury could make a certain setoff against the award); *Carson* v. *Commonwealth*, 382 S. W. 2d 85, 95 (1964) ("The fourth instruction was the usual reasonable doubt admonition"). The court has acknowledged that "sometimes matters more appropriately the subject of admonition are included with or as a part of the instructions." *Webster* v. *Commonwealth*, *supra*, at 36.

In pre-*Carter* cases holding that a defendant had no right to have the jury told not to draw an adverse inference, Kentucky's highest court did not distinguish admonitions from instructions. See, *e. g.*, *Luttrell* v. *Commonwealth*, 554 S. W. 2d 75, 79–80 (1977) ("instruction"); *Scott* v. *Commonwealth*, 495 S. W. 2d 800, 802 ("written admonition," "admonition"),

[4] That Rule provides:

"The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall give an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him in any way."

cert. denied, 414 U. S. 1073 (1973); *Green* v. *Commonwealth*, 488 S. W. 2d 339, 341 (1972) ("instruction"); *Dixon* v. *Commonwealth*, 478 S. W. 2d 719 (1972) ("an instruction admonishing the jury"); *Jones* v. *Commonwealth*, 457 S. W. 2d 627, 630 (1970) ("admonition" during another witness' testimony), cert. denied, 401 U. S. 946 (1971); *Roberson* v. *Commonwealth*, 274 Ky. 49, 50, 118 S. W. 2d 157, 157–158 (1938) ("admonition"), citing *Hanks* v. *Commonwealth*, 248 Ky. 203, 205, 58 S. W. 2d 394, 395 (App. 1933) ("instruction"). A statement to the jury not to draw an adverse inference from the defendant's failure to testify would seem to fall more neatly into the admonition category than the instruction category. Cautioning the jury against considering testimony *not* given differs little from cautioning it not to consider testimony that was.[5] However, the Kentucky Criminal Rules treat it as an instruction. See n. 4, *supra*.

One procedural difference between admonitions and instructions is that the former are normally oral, while the latter, though given orally, are also provided to the jury in writing. See generally 1 Palmore, ch. 12. However, this distinction is not strictly adhered to. As the cases cited above indicate, "admonitions" frequently appear in the written instructions. See also *id.*, at 21 ("An 'admonition' . . . need not be in writing. However, it is not error to give such admonition in writing as an instruction"); *id.*, at 17. Conversely, instructions may be given only orally if the defendant waives the writing requirement. Brief for Respondent

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[5] Indeed, such a statement is substantively indistinguishable from an "admonition" given in this very case. When James was brought into court for the persistent-felony-offender hearing, he was in handcuffs. After requesting and being denied a mistrial, his attorney asked: "Can we at least have an admonition to the jury, your Honor?" The judge obliged, telling the jury it was "admonished not to consider the fact that the defendant was brought into the courtroom shackled and handcuffed. That should have nothing to do, no bearing at all, on your decision in this case." 5 Tr. 4.

25; Tr. of Oral Arg. 31, 38–39. The State contends, though without citing any authority, that the instructions must be all in writing or all oral, and that it would have been reversible error for the trial judge to have given this "instruction" orally. Yet the Kentucky Court of Appeals has held, for example, that there was no error where the trial court, after reading the written instructions, told the jury orally that its verdict must be unanimous, a statement normally considered an "instruction." *Freeman* v. *Commonwealth*, 425 S. W. 2d 575, 579 (1968). And in several cases the Court of Appeals has found no error where the trial court gave oral explanations of its written instructions. *E. g.*, *Allee* v. *Commonwealth*, 454 S. W. 2d 336, 342 (1970), cert. dism'd *sub nom. Green* v. *Kentucky*, 401 U. S. 950 (1971); *Ingram* v. *Commonwealth*, 427 S. W. 2d 815, 817 (1968). Finally, given Kentucky's strict contemporaneous-objection rule, see, *e. g.*, *Webster* v. *Commonwealth*, 508 S. W. 2d, at 36; *Reeves* v. *Commonwealth*, *supra*, at 930; Ky. Rule Crim. Proc. 9.54(2), it would be odd if it were reversible error for the trial court to have given a *Carter* instruction orally at the defendant's request. See also *Weichhand* v. *Garlinger*, 447 S. W. 2d 606, 610 (Ky. App. 1969) (harmless error to give oral admonition where written instruction was requested and appropriate).

B

There can be no dispute that, for federal constitutional purposes, James adequately invoked his substantive right to jury guidance. See *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965). The question is whether counsel's passing reference to an "admonition" is a fatal procedural default under Kentucky law adequate to support the result below and to prevent us from considering petitioner's constitutional claim. In light of the state-law background described above, we hold that it is not. Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation

of federal constitutional rights. Cf. *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). *Carter* holds that if asked to do so the trial court must tell the jury not to draw the impermissible inference. To insist on a particular label for this statement would "force resort to an arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), and would further no perceivable state interest, *Henry* v. *Mississippi*, 379 U. S. 443, 448–449 (1965). See also *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 293–302 (1964). "Admonition" is a term that both we[6] and the State Supreme Court have used in this context and which is reasonable under state law and normal usage. As Justice Holmes wrote 60 years ago: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923).

C

The State argues that this is more than a case of failure to use the required magic word, however. It considers James' request for an admonition to have been a deliberate strategy. He sought an oral statement only in order to put "less emphasis on this particular subject, not before the jury, not in writing to be read over and over, but to have been commented upon and passed by." Tr. of Oral Arg. 39–40. James, now represented by his third attorney, seems to concede that the first attorney did seek an oral admonition. He does not argue that the trial court had to include the requested statement in the instructions,[7] though he suggests that it could

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[6] See *Bruno* v. *United States*, 308 U. S. 287, 294 (1939) (Court unwilling to assume "that jurors, if properly admonished, neither could nor would heed the instructions of the trial court" not to draw an improper inference).

[7] When asked at oral argument whether his "basic argument [is] that your client was entitled to an instruction because he had requested something almost like an instruction or that he was entitled to an admonition

have done so, and that he would have been happy with either a written or an oral statement. Brief for Petitioner 23–25.

We would readily agree that the State is free to require that all instructions be in writing;[8] and to categorize a no-adverse-inference statement as an instruction. The Constitution obliges the trial judge to tell the jury, in an effective manner, not to draw the inference if the defendant so requests; but it does not afford the defendant the right to dictate, inconsistent with state practice, *how* the jury is to be told. Cf. *Taylor* v. *Kentucky*, 436 U. S. 478, 485–486 (1978). In *Lakeside* v. *Oregon*, 435 U. S. 333 (1978), we held that the judge may give a no-adverse-inference instruction over the defendant's objection. Given that, the State may surely give a written instruction over the defendant's request that it be oral only. And if that is so, the State can require that if the instruction is to be given, it be done in writing. For reasons similar to those set out in *Lakeside*, we do not think that a State would impermissibly infringe the defendant's right not to testify by requiring that if the jury is to be alerted to it, it be alerted in writing. See generally *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973).

This is not a case, however, of a defendant attempting to circumvent such a firm state procedural rule. For one thing, as the discussion in Part II–A, *supra*, indicates, the oral/written distinction is not as solid as the State would have us believe. Admonitions can be written and instructions oral, and the Kentucky Supreme Court has itself used the term "admonition" in referring to instructions that "admonish." In addition, our own examination of the admittedly incomplete record[9] reveals little to support the State's

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because he had requested an admonition," petitioner's counsel answered that his "basic argument is that he was entitled to an admonition, at the very least." Tr. of Oral Arg. 25.

[8] Whether Kentucky has in fact done so is not clear. See *supra*, at 348.

[9] Neither of the trial lawyers was involved in the appeal. Thus, appellate counsel and the appellate court were working from the same unelaborated record that is before us.

view of petitioner's request. The single passing reference to an "admonition" is far too slender a reed on which to rest the conclusion that petitioner insisted on an oral statement and nothing but.

Apart from this one use of the term, there is absolutely nothing in the record to indicate any such insistence. Indeed, other indications are to the contrary. Before going off the record, defense counsel stated that he had "a matter in regards to the *instructions*." Tr. of Hearing (Jan. 19, 1982), p. 3 (emphasis added). Returning to the record, he noted that he "object[ed] to several of the instructions being given to the jury" and that his request for "an admonition" to the jury regarding the defendant's failure to testify had been overruled. The court below inferred from these two statements that counsel had sought an oral statement apart from the instructions. Yet the statements could also be a shift from an objection to what was being said to the jury ("the instructions being given"), to an objection to what was not ("requests an admonition . . . which was overruled"). It is also possible that counsel sought both a written and an oral statement and was denied on both counts.

Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here. In the circumstances of this case, we cannot find that petitioner's constitutional rights were respected or that the result below rests on independent and adequate state grounds.

III

Respondent argues that even if there was error, it was harmless. It made the same argument below, but the Kentucky Supreme Court did not reach it in light of its conclusion that no error had been committed. We have not determined whether *Carter* error can be harmless, see *Carter*, 450 U. S., at 304, and we do not do so now. Even if an evaluation of harmlessness is called for, it is best made in state court

before it is made here. The case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE MARSHALL took no part in the decision of this case.

JUSTICE REHNQUIST dissents for the reasons stated in his dissenting opinion in *Carter* v. *Kentucky*, 450 U. S. 288, 307–310 (1981).

Syllabus

LIMBACH, TAX COMMISSIONER OF OHIO *v.* HOOVEN & ALLISON CO.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 83–96. Argued February 22, 1984—Decided April 18, 1984

Respondent manufacturer of cordage products, in filing its Ohio ad valorem personal property tax returns for 1976 and 1977, deducted from the total value of its inventory the value of imported fibers that were stored in their original packages for future use in the manufacturing process. In taking this deduction, respondent relied on *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 *(Hooven I)*, a case involving the same tax and the same parties as the instant case, as well as similar property, and wherein it was held that subjecting the property in question there to the Ohio personal property tax would violate the Import-Export Clause. Petitioner Ohio Tax Commissioner disallowed the deduction and accordingly increased the assessments, relying on *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, where the assessment of a State's nondiscriminatory ad valorem property tax on an inventory of imported tires maintained at a wholesale distribution warehouse was held not to be within the Import-Export Clause's prohibition against States' levying "any Imposts or Duties on Imports." The Ohio Board of Tax Appeals reversed, ruling that petitioner was collaterally estopped by the decision in *Hooven I* from levying the increased assessments, and rejecting respondent's argument that *Michelin* implicitly overruled *Hooven I*. The Ohio Supreme Court affirmed.

Held:

1. The assessment of the Ohio personal property tax on the original-package imported fibers in question does not violate the Import-Export Clause. This Court in *Michelin* specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation of imports, and changed the focus of Import-Export Clause cases from whether the goods have lost their status as imports to whether the tax sought to be imposed is an "Impost or Duty." *Hooven I*, having been decided under the original-package doctrine, was among the progeny of *Low* v. *Austin*, 13 Wall. 29, which was expressly overruled in *Michelin*. Thus, *Hooven I* is inconsistent with *Michelin*, and although not expressly overruled in *Michelin*, must be regarded as retaining no vitality since the *Michelin* decision, and accordingly is overruled to the extent that it espoused the original-package doctrine. Pp. 357–361.

2. Petitioner is not barred by collateral estoppel from levying the increased assessments. Pp. 361–363.

(a) Collateral estoppel was applied here as a matter of federal, not state, law, and thus the case is not insulated from review in this Court on the asserted ground that because *Michelin* did not expressly overrule *Hooven I*, state-law principles of collateral estoppel bar imposition of the Ohio tax on respondent's imported fibers. The case concerns federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court. Pp. 361–362.

(b) While the parties, the tax, and the goods imported in their containers are the same here as in *Hooven I*, the years involved are not. Because of this difference in tax years, the case is controlled by *Commissioner* v. *Sunnen*, 333 U. S. 591, a federal income tax case wherein it was held that an earlier decision of the Board of Tax Appeals involving the same facts, questions, and parties, but different tax years, was not conclusive under the collateral-estoppel doctrine because certain intervening decisions of this Court made manifest the error of the result reached by the Board. Failure to follow *Sunnen*'s dictates would lead to the very tax inequality that the admonition of that case was designed to avoid. Pp. 362–363.

4 Ohio St. 3d 169, 447 N. E. 2d 1295, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Richard C. Farrin, Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the briefs was *Anthony J. Celebrezze, Jr.*, Attorney General.

Michael A. Nims argued the cause for respondent. With him on the brief was *Charles H. Moellenberg, Jr.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945) *(Hooven I)*, this Court passed upon the constitutionality of Ohio's application of a nondiscriminatory ad valorem personal property tax to imported fibers still in their original packages. The result there was unfavorable to the State. In this case, the Tax Commissioner of Ohio asks us to sustain

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**James F. Gossett* filed a brief for the International Association of Assessing Officers as *amicus curiae* urging reversal.

the application of the same nondiscriminatory ad valorem personal property tax to like fibers, still in their original packages, imported by the same manufacturer. The case thus presents, primarily, an issue of preclusion framed in terms of collateral estoppel.

I

The Hooven & Allison Company (Hooven) is a domestic manufacturer of cordage products made from natural fibers. These fibers—hemp, sisal, jute, manila, and the like—are not grown in the United States and must be imported. Upon their arrival in this country, the imported fibers are transported by rail to Hooven's plant in Xenia, Ohio, where they are stored in their original packages for future use in Hooven's manufacturing process.

In accord with Ohio Rev. Code Ann. §5711.16 (1980), Hooven timely filed personal property tax returns for 1976 and 1977. In those returns, Hooven listed these original-package imported fibers as "imports," but deducted their value from the total value of its manufacturing inventory. The following written explanation was given:

> "The inventories represent fibers imported by the taxpayer from foreign countries, held in the original packages in its warehouses in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibers so used, or removed from the original package, are thereupon transferred to the Goods in Process and are included in the taxable inventories in Xenia City." Joint Record in the Supreme Court of Ohio 11.

In taking this deduction, Hooven relied expressly on this Court's 1945 decision in *Hooven I*. In that decision, the Court, by a closely divided vote, ruled that subjecting Hooven's imported original-package raw materials to Ohio personal property taxation would be in violation of the

Import-Export Clause of the United States Constitution, Art. I, § 10, cl. 2.

The Tax Commissioner of Ohio, however, for each of the two years in question, disallowed the deduction and added back into Hooven's taxable manufacturing inventory the imported raw materials held for future use in manufacturing. Hooven's asserted property tax liability for each of those years, accordingly, was increased.

Upon application for review, the Tax Commissioner sustained the increased assessments. She rejected federal constitutional arguments advanced by Hooven, as well as an additional argument that, by the decision in *Hooven I*, she was collaterally estopped from levying the increased assessments. The Tax Commissioner in so ruling relied on *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976).

Hooven then appealed to the Ohio Board of Tax Appeals, advancing the same collateral-estoppel and federal constitutional issues. That Board reversed the Tax Commissioner. App. to Pet. for Cert. A–10. It ruled that the Commissioner was collaterally estopped by the decision in *Hooven I*. It noted that the parties were the same as those in *Hooven I;* that the issue as to the taxability of original-package raw materials was also the issue in *Hooven I;* that the raw materials and the type of taxation were identical to those involved in *Hooven I;* that *Hooven I* has not been "reversed" by this Court "and thus, has the force and effect of law"; and that, under the doctrine of collateral estoppel, litigation of the issue was barred "and the exemption from taxation was improperly held to be unavailable." App. to Pet. for Cert. A–23. The Board rejected the Tax Commissioner's argument that the decision in *Michelin* implicitly had overruled *Hooven I*. The Board did not reach or consider the constitutional issues, observing that it lacked jurisdiction to do so. App. to Pet. for Cert. A–20; see *S. S. Kresge Co.* v. *Bowers*, 170 Ohio St. 405, 166 N. E. 2d 139 (1960), appeal dism'd, 365 U. S. 466 (1961).

Hooven and the Tax Commissioner each filed a notice of appeal to the Supreme Court of Ohio, the taxpayer doing so in order to preserve the constitutional issues, and the Tax Commissioner pressing the collateral-estoppel issue. The Supreme Court of Ohio affirmed the ruling of the Ohio Board of Tax Appeals. *Hooven & Allison Co.* v. *Lindley*, 4 Ohio St. 3d 169, 447 N. E. 2d 1295 (1983). That court, in a unanimous *per curiam* opinion, ruled that principles of collateral estoppel prohibited the Tax Commissioner from assessing personal property taxes upon Hooven's imported raw materials held in the original containers for future use in manufacturing. It acknowledged the presence of *Michelin* but noted that this Court had not overruled *Hooven I* in *Michelin*, although it had not hesitated expressly to overrule *Low* v. *Austin*, 13 Wall. 29 (1872). Thus, the Ohio court observed, this Court's "action—or inaction—must be accorded conclusive effect, at least in regard to its intent in reappraising its earlier ruling in *Hooven I*." 4 Ohio St. 3d, at 172, 447 N. E. 2d, at 1298. The court then "decline[d] to address the [federal] constitutional issues raised by Hooven in its appeal." *Id.*, at 173, 447 N. E. 2d, at 1299.

We granted certiorari. 464 U. S. 813 (1983).

II

In *Low* v. *Austin*, *supra*, this Court, in an opinion by Justice Field, unanimously enunciated the "original-package" doctrine, although perhaps not for the first time, see *Brown* v. *Maryland*, 12 Wheat. 419, 442 (1827). It held that, under the Import-Export Clause, goods imported from a foreign country are not subject to state ad valorem property taxation while remaining in their original packages, unbroken and unsold, in the hands of the importer.

In *Michelin Tire Corp.* v. *Wages*, *supra*, an importer challenged the assessment of Georgia's nondiscriminatory ad valorem property tax upon an inventory of imported tires and tubes maintained at a wholesale distribution warehouse.

This Court rejected the challenge to the state tax on the imported tires.[1] It found that in the history of the Import-Export Clause, there was nothing to suggest that a tax of the kind imposed on goods that were no longer in import transit was the type of exaction that was regarded as objectionable by the Framers. The tax could not affect the Federal Government's exclusive regulation of foreign commerce since it did not fall on imports as such. Neither did the tax interfere with the free flow of imported goods among the States. The Clause, while not specifically excepting nondiscriminatory taxes that had some impact on imports, was not couched in terms of a broad prohibition of every tax, but prohibited States only from laying "Imposts or Duties," which historically connoted exactions directed only at imports or commercial activities as such. The Court concluded that its reliance a century earlier in *Low* v. *Austin* "upon the *Brown* dictum . . . was misplaced." 423 U. S., at 283. Chief Justice Taney's opinion in the *License Cases*, 5 How. 504 (1847), was carefully analyzed, with the Court concluding that that opinion had been misread in *Low*. "[P]recisely contrary" to the reading it was given in *Low*, Chief Justice Taney's *License Cases* opinion was authority "that nondiscriminatory ad valorem property taxes are not prohibited by the Import-Export Clause." 423 U. S., at 301. It followed, this Court concluded, that "*Low* v. *Austin* was wrongly decided" and "therefore must be, and is, overruled." *Ibid.* *Hooven I* was directly cited only once in *Michelin*, and then only in a footnote in which the Court stated that it found it unnecessary to address the assertion in *Hooven I* that Congress could consent to state nondiscriminatory taxation of imports even

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[1] Because the respondents there, the county Tax Commissioner and Tax Assessors, did not cross-petition for certiorari, the Georgia courts' ruling that tubes still in corrugated shipping cartons were immune from the tax was not before this Court for review. *Michelin Tire Corp.* v. *Wages*, 423 U. S., at 279, n. 2.

were such taxes within the prohibition of the Import-Export Clause. See 423 U. S., at 301, n. 13. While we acknowledge that *Hooven I* was not expressly overruled in *Michelin*, the latter case strongly implies that the foundation of the former had been seriously undermined.[2]

It is apparent, and indeed clear, that *Michelin*, with its overruling of *Low* v. *Austin*, adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause. We said precisely as much in *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734 (1978):

> "Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause. . . . So long as the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation. . . .
>
> "*Michelin* initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an 'Impost or Duty.' 423 U. S., at 279, 290–294. Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause:
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> 'The Framers of the Constitution thus sought to alleviate three main concerns . . . : the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented

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[2] Since *Michelin*, *Hooven I* has been cited by this Court only twice. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 111 (1980), and *Kleppe* v. *New Mexico*, 426 U. S. 529, 540 (1976). Neither citation bears upon the issue before us in the present case.

> by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.' *Id.*, at 285–286 (footnotes omitted).
>
> "The ad valorem property tax there at issue offended none of these policies. . . . The Court therefore concluded that the Georgia ad valorem property tax was not an 'Impost or Duty,' within the meaning of the Import-Export Clause . . . ." *Id.*, at 752–754.

See also *id.*, at 762 (opinion concurring in part and concurring in result).

To repeat: we think it clear that this Court in *Michelin* specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. *Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty." See P. Hartman, Federal Limitations on State and Local Taxation, § 5:4 (1981); Hellerstein, State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 Mich. L. Rev. 1426, 1427–1434 (1977). Cf. *Montana* v. *United States*, 440 U. S. 147 (1979).

Hooven I held that, under the Clause, a nondiscriminatory state ad valorem personal property tax could not be imposed until the imported goods had lost their status as imports by being removed from their original packages. This decision was among the progeny of *Low* v. *Austin* for it, too, was decided on the original-package doctrine. Thus, *Hooven I* is

inconsistent with the later ruling in *Michelin* that such a tax is not an "Impost or Duty" and therefore is not prohibited by the Clause. Although *Hooven I* was not expressly overruled in *Michelin*, it must be regarded as retaining no vitality since the *Michelin* decision. The conclusion of the Supreme Court of Ohio that *Hooven I* retains current validity in this respect is therefore in error. A contrary ruling would return us to the original-package doctrine. So that there may be no misunderstanding, *Hooven I*, to the extent it espouses that doctrine, is not to be regarded as authority and is overruled.

III

A

Respondent Hooven, however, argues that because the Court in *Michelin* did not expressly overrule *Hooven I*, it must follow that *state*-law principles of collateral estoppel bar the imposition of an ad valorem tax upon Hooven's raw materials inventory.

We reject the suggestion that we are confronted, in the present posture of the case, with a claim of collateral estoppel under state, as distinguished from federal, law. *Hooven I* was a decision concerned with the application and impact of the Import-Export Clause upon the Ohio tax. The issue, thus, was one of a federal constitutional barrier. The Supreme Court of Ohio certainly so viewed it. It referred to both *Hooven I* and *Michelin* in federal constitutional terms and it described the issue before it as whether the contested tax "may constitutionally be assessed" in light of the Import-Export Clause. 4 Ohio St. 3d, at 171, 447 N. E. 2d, at 1297. And it viewed collateral estoppel in the light of precepts set forth in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), a federal income tax case. From this premise, the Ohio court moved to its judgment that the levy of the tax was "barred by the doctrine of collateral estoppel." 4 Ohio St. 3d, at 173, 447 N. E. 2d, at 1299.

Collateral estoppel, therefore, was applied as a matter of federal, not state, law. We perceive in this case no state-law

overtones that, by any stretch of the imagination, could serve to insulate the case from review here. We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court. The issue, then, is reviewable here. See *Deposit Bank* v. *Frankfort*, 191 U. S. 499 (1903); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938); *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 129, n. 1 (1941).

B

We move on to respondent's collateral-estoppel argument. It is true, of course, that the parties in *Hooven I* were the same parties as those before us in the present case. It is true that the property sought to be taxed for 1976 and 1977 identifies with the property sought to be taxed for 1938, 1939, and 1940 in *Hooven I*. And it is true that the tax involved is the same Ohio nondiscriminatory ad valorem personal property tax. The parties, the tax, and the goods imported and their containers are the same. The Tax Commissioner does not dispute this. Tr. of Oral Arg. 12. Collateral-estoppel concepts, therefore, might have an initial appeal.

The years involved in this tax case, however, are not the same tax years at issue in *Hooven I*. Because of this, *Commissioner* v. *Sunnen*, *supra*, is pertinent and, indeed, is controlling. That case concerned licenses granted by a patent owner and his assignment of interests in the royalty agreements to his wife. An earlier decision of the Board of Tax Appeals, involving the same facts, questions, and parties but different tax years, was held not to be conclusive under the doctrine of collateral estoppel because certain intervening decisions of this Court made manifest the error of the result that had been reached by the Board. 333 U. S., at 602–607. The reason for not applying the collateral-estoppel doctrine in the present case is even stronger than that in *Sunnen*, for here the constitutional analysis of the earlier case is *repudiated* by this Court's intervening pronouncement.

Because the Supreme Court of Ohio did not apply the principles of *Sunnen*, its judgment must be vacated and the case remanded. Failure to follow *Sunnen*'s dictates would lead to the very tax inequality that the admonition of that case was designed to avoid. Hooven then would be immune forever from tax on its imported goods because of an early decision based upon a now repudiated legal doctrine, while all other taxpayers would have their tax liabilities determined upon the basis of the fundamentally different approach adopted in *Michelin*. See *Sunnen*, 333 U. S., at 599.

Petitioner, therefore, is not barred by collateral estoppel in asserting the increases in tax for 1976 and 1977.

IV

The case is before us without a developed factual record. Hooven takes the position that it is entitled to an opportunity to demonstrate that the facts of this case are significantly different from those of *Michelin*, so that the result in that case is not controlling here. Hooven suggests that in *Michelin*, the tires had been mingled with domestically manufactured tires and had been arranged and stored for sale and delivery; moreover, the tires were finished goods. Here, according to Hooven, its imported fibers are not for sale, are not finished goods, and are destined for incorporation into a manufacturing process. Hooven further asserts that, once a factual record has been developed, a court will be in a position to examine the case in the light of any other constitutional provision respondent is then in a position to invoke, including the Foreign Commerce Clause.

Any development of the record, of course, should take place in the state courts and first be evaluated there. Accordingly, we make no judgment on the merits of Hooven's constitutional claims. The judgment of the Supreme Court of Ohio is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SCHNEIDER MOVING & STORAGE CO. *v.* ROBBINS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82–1860. Argued February 21, 1984—Decided April 18, 1984*

Petitioner employers entered into collective-bargaining agreements with a union that required them to participate in two multiemployer employee-benefit trust funds. The trust agreements required petitioners to contribute to the funds according to the applicable terms of their collective-bargaining agreements. The terms of the trust agreements were incorporated by reference into the collective-bargaining agreements and authorized respondent trustees to initiate "any legal proceedings [that they] in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions." Respondents filed complaints in Federal District Court, claiming that petitioners failed to meet their contribution requirements, and requesting the court to order an accounting and immediate payment of all sums thereby determined to be due. Petitioners defended on the ground that the complaints raised disputed interpretations under the collective-bargaining agreements that first must be submitted to arbitration. The bargaining agreements required arbitration of "differences that arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this agreement," and no parties other than the union or the employer were given access to the arbitration process. The District Court dismissed the suits pending arbitration. The Court of Appeals reversed and remanded, holding that the relevant agreements indicated no intent to require the arbitration of contractual disputes between the trustees and the employers and thus that failure to arbitrate could not bar respondents' suits.

Held: Respondents may seek judicial enforcement of the trust terms against petitioners without first submitting to arbitration an underlying dispute over the meaning of a term in the collective-bargaining agreements. Pp. 370–376.

(a) The presumption that a promisor may assert against a third-party beneficiary any defense that he could assert against the promisee if the promisee were suing on the contract, should not be applied so inflexibly

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*Together with No. 82–1862, *Prosser's Moving & Storage Co.* v. *Robbins et al.*, also on certiorari to the same court.

as to defeat the intention of the parties. Whether the presumption applies in this case to require respondents, as third-party beneficiaries of the collective-bargaining agreements, to arbitrate disputed terms of the collective-bargaining agreements depends on the contractual intent of the parties to all the agreements at issue. Pp. 370–371.

(b) The presumption of arbitrability of disputes between a union and an employer is not applicable in determining whether the parties agreed to require the arbitration of disputes between trustees of employee-benefit funds and employers, even if those disputes raise questions of interpretation under the collective-bargaining agreements. Pp. 371–372.

(c) Neither the trust agreements nor the collective-bargaining agreements at issue here evidence any intent on the part of the parties to condition the contractual right of respondents to seek judicial enforcement of the trust provisions on exhaustion of the arbitration procedures contained in petitioners' collective-bargaining agreements. Pp. 372–376.

700 F. 2d 433, affirmed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

David F. Yates argued the cause and filed briefs for petitioner in No. 82–1860. *Charles W. Bobinette* argued the cause for petitioner in No. 82–1862. With him on the briefs was *Kevin M. O'Keefe.*

Russell N. Luplow argued the cause for respondents. With him on the brief were *Diana L. S. Peters* and *Donald J. Weyerich.*†

JUSTICE POWELL delivered the opinion of the Court.

The issue presented in these two cases is whether the trustees of two multiemployer trust funds may seek judicial enforcement of the trust terms against a participating employer without first submitting to arbitration an underlying dispute over the meaning of a term in the employer's collective-bargaining agreement.

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†*Stephen P. Pepe* and *Joel M. Grossman* filed a brief for the Merchants and Manufacturers Association et al. as *amici curiae* urging reversal.

Michael H. Gottesman, Robert M. Weinberg, Laurence Gold, and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

I

Respondents are the trustees of two multiemployer trust funds, the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (Trust Funds).[1] Petitioners are two employers—Prosser's Moving & Storage Co. (Prosser's) and Schneider Moving & Storage Co. (Schneider)—who have agreed to participate in the trust funds. Respondents filed separate complaints against petitioners in the United States District Court for the Eastern District of Missouri, claiming that petitioners had failed to meet their contribution requirements and had refused to allow an audit of their payroll records. Respondents requested the District Court to order an accounting and immediate payment of all sums thereby determined to be due. They alleged federal subject-matter jurisdiction under § 301(a) of the Labor Management Relations Act (LMRA), 29 U. S. C. § 185(a), and § 502 of the Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1132.[2] Petitioners defended on the ground that respondents' complaints raised disputed interpretations under the collective-bargaining agreements that first must be submitted to the applicable arbitration procedures.[3] The District Court agreed with petitioners and

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[1] Both multiemployer funds were established pursuant to § 302(c)(5) of the Labor Management Relations Act, 29 U. S. C. § 186(c)(5). The funds also are governed by the Employee Retirement Income Security Act, 29 U. S. C. § 1001 *et seq.*, and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U. S. C. § 1145.

[2] Section 301(a) of the LMRA provides a federal forum for suits to enforce labor contracts, including pension and welfare fund agreements. Section 502 of ERISA also provides a federal forum for enforcement of the various duties imposed by such trust fund agreements.

[3] Cf. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965) (exhaustion of contract grievance procedure generally is a predicate to suits seeking to enforce collective-bargaining agreements under § 301 of the LMRA). Petitioners' responses to respondents' claims differed in some minor respects. The primary issue in the Prosser case was whether the collective-bargaining agreement limited the scope of the trustees' asserted authority

dismissed the suits pending arbitration. It held that although arbitration is not a prerequisite for "simple collection matters" in which the employer's liability under the collective-bargaining agreement is clear, arbitration is required in claims such as these where interpretation of the collective-bargaining agreement is at issue.

A three-judge panel for the Court of Appeals for the Eighth Circuit reversed and held that arbitration was not a prerequisite to federal suit in these two cases. *Robbins* v. *Prosser's Moving & Storage and Schneider Moving & Storage*, Nos. 80–2116, 80–2117 (CA8, Mar. 24, 1982) *(per curiam)*. An en banc court of the Eighth Circuit agreed with the panel. After examining competing considerations under the federal labor laws and under the federal laws governing employee trust funds, the court held that the relevant agreements indicated no intent on the part of the parties to require the arbitration of contractual disputes between the trustees and the employers and thus that failure to arbitrate could not bar respondents' suits. The en banc court, therefore, reversed the decision of the District Court and remanded for further proceedings. 700 F. 2d 433 (1983). We granted certiorari in view of an apparent conflict among the Circuits on this issue.[4] 464 U. S. 813 (1983). We now affirm.

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to conduct an audit of the company's records. Schneider submitted to the audit, but claimed that the trustees' suit raised a dispute under the collective-bargaining agreement as to which employees were covered by the contribution requirement. Relevant here, however, is the fact that both petitioners defended on the ground that the trustees' complaints raised arbitrable disputes under the collective-bargaining agreements that could not be reviewed by a federal court prior to arbitration.

[4] See, *e. g.*, *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F. 2d 171 (CA7 1980) (arbitration of disputes between the trustees and employer involving interpretations of a collective-bargaining agreement a prerequisite to judicial review); *Trustees of National Benefit Fund for Hospital & Health Care Employees* v. *Constant Care Community Health Center, Inc.*, 669 F. 2d 213 (CA4 1982) (same).

II

As resolved by the Court of Appeals, these cases present a narrow question of contract interpretation. The en banc court considered only whether the parties to the collective-bargaining agreements and the trust agreements intended to require the arbitration of disputes between the trustees and the employer before the trustees could exercise their contractual right to sue in federal court.[5] Because of its resolution of this issue, the Court of Appeals did not reach respondents' argument that requiring the trustees to submit their disputes with the employer to the applicable arbitration procedures was prohibited as a matter of law. If we agree with the Court of Appeals that the parties did not provide for such an arrangement, we also need not address that argument. We turn first, therefore, to an analysis of the relevant agreements.

Petitioners entered into collective-bargaining agreements with Local 610 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

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[5] The en banc court expressed its holding at the outset as follows:

"Our conclusion is that the national pension policy embodied in the [LMRA], [ERISA], and the [MPPAA], together with the terms of the collective-bargaining agreement and accompanying trust instruments, dictate that these trustees not be bound by the arbitration procedure, which they have no right to initiate." 700 F. 2d, at 435.

The subsequent explanation of that holding, and the court's concluding statements, make clear that it consulted the "national pension policy" only to ascertain the parties' contractual intent. After examining the agreements, the en banc court held:

"[A]rbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case. But they do not." *Id.*, at 442.

(Union). These agreements required petitioners to participate in the two multiemployer trust funds, and incorporated the terms of the two trust agreements by reference.[6] The trust agreements[7] required petitioners to contribute to the funds according to the applicable terms of their separate collective-bargaining agreements.[8] To ensure compliance with the contribution requirements, the trust agreements gave the trustees the authority to examine petitioners' payroll records.[9] If the trustees determined that petitioners were not complying with their contribution requirements, they had the authority under the trust agreements to initiate legal proceedings to enforce those requirements:

> "The Trustees . . . shall have the power to demand and collect the contributions of the Employers to the Fund. [The] Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions . . . which may be owed to the Trust Fund, without prejudice, however,

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[6] See Art. XV, Sec. 3 (Health & Welfare); Art. XVI, Sec. 3 (Pension) of Prosser's Collective-Bargaining Agreement, App. 76.

[7] The parties inform us that the relevant terms of the Pension Fund Agreement and the Health and Welfare Fund Agreement are identical in all pertinent respects. Only the Pension Fund Agreement was included in the joint appendix. References, therefore, will be made only to that agreement.

[8] Article III, Sec. 1, of the Pension Fund Agreement provides in part: "Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties." App. 21.

[9] Article III, Sec. 5, of the Pension Fund Agreement provides in part: "The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust." App. 23.

to the rights of the Union to take whatever steps which may be deemed necessary for such purpose." Pension Fund Agreement, Art. III, Sec. 4., App. 22.

The relevant terms of the two collective-bargaining agreements at issue here are substantially identical. Both required weekly payments to the funds for "each regular Employee." No contributions were required for employees who worked "either temporarily or in cases of emergency."[10] Each collective-bargaining agreement also contained an arbitration clause that required the arbitration of any "differences . . . between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of [the collective-bargaining] agreement." *Id.*, at 55. Arbitration could be demanded by either the Union or the Company in the case of Prosser's collective-bargaining agreement, or by the Union alone in the case of Schneider's collective-bargaining agreement. No other parties were given access to the arbitration process.

III

A

Petitioners argue that as third-party beneficiaries of the collective-bargaining agreements, the trustees are bound by the arbitration clauses provided therein to the same extent the Union would be if it were seeking judicial enforcement of those agreements. They rely on the general rule that the promisor may assert against the beneficiary any defense that he could assert against the promisee if the promisee were suing on the contract. See Restatement (Second) of Contracts § 309, Comment *b* (1981); S. Williston, Contracts § 395 (3d ed. 1959); 4 A. Corbin, Contracts § 819 (1951). That rule, however, is merely a rule of construction useful in determining contractual intent. It should not be applied so inflexibly

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[10] See Prosser's Collective Bargaining Agreement, Art. XV, Secs. 5 and 6 (Health & Welfare); Art. XVI, Secs. 5 and 6 (Pension). App. 77–79.

as to defeat the intention of the parties. Where the language of the contract, or the circumstances under which it was executed, establish that the parties have provided that the right of the beneficiary is not to be affected by any defenses that the promisor might have against the promisee, the rule is inapplicable.[11] Restatement (Second) of Contracts § 309, Comment *b* (1981). See also 4 A. Corbin, Contracts §§ 818, 819 (1951). Thus, the question is whether the parties to the agreements at issue here intended to condition the trustees' contractual right to seek judicial enforcement of the trust agreements on exhaustion of the arbitration procedures set forth in the collective-bargaining agreements.

B

Before attempting to ascertain the parties' intent from the relevant agreements, we must determine whether the presumption in favor of arbitrability applied in the *Steelworkers Trilogy*[12] is applicable here. That presumption is an accepted rule of construction in determining the applicability of an arbitration clause to disputes between the union and the employer. Such a presumption furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing

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[11] In *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960), for example, this Court rejected the argument that a rule of construction generally applicable to third-party beneficiaries was applicable to the trust beneficiaries of a collective-bargaining agreement. JUSTICE BRENNAN writing for the majority refused to employ the general rule of construction urged by the promisor because the collective-bargaining agreement at issue "[was] not a typical third-party beneficiary contract," and the circumstances surrounding the agreement counseled against the general inference. *Id.*, at 468–469. We adopt the same approach here and decline to adopt a mechanical application of the rule of construction urged by petitioners.

[12] See *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

collective bargaining. See *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578, 582–583 (1960). There is, however, less to commend the presumption in construing the applicability of arbitration clauses to disputes between the employer and the trustees of employee-benefit funds.

Arbitration promotes labor peace because it requires the parties to forgo the economic weapons of strikes and lockouts. Because the trustees of employee-benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all.[13] We conclude, therefore, that the presumption of arbitrability is not a proper rule of construction in determining whether arbitration agreements between the union and the employer apply to disputes between trustees and employers, even if those disputes raise questions of interpretation under the collective-bargaining agreements.[14]

C

Without the presumption of arbitrability, the agreements at issue here evidence no intent on the part of the parties to require arbitration of disputes between the trustees and the employers. Neither the terms of the trust agreements nor those of the collective-bargaining agreements contain any such requirement, and the circumstances surrounding the

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[13] In *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 337 (1981), this Court recognized that "disputes between benefit fund trustees over the administration of the trust cannot, as can disputes between parties in collective bargaining, lead to strikes, lockouts, or other exercises of economic power." We think that the same observation applies to disputes between the trustees and the employer. Although the employer has economic weapons at its disposal, they would serve little purpose in disputes with the trustees of employee-benefit funds.

[14] The presumption of arbitrability is, of course, generally applicable to any disputes between the *union* and the employer. In those circumstances, the presumption serves the national labor policy and fully accords with the probable intent of the parties.

execution of each suggest that none should be inferred. We discuss each agreement in turn.

Under the terms of the trust agreements, the trustees have broad authority to initiate "*any* legal proceedings [that they] in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions."[15] Nowhere in the trust agreements is the exercise of that authority expressly conditioned on the exhaustion of any contractual remedies that might be found in the collective-bargaining agreements of individual employers. Nor have petitioners successfully identified any evidence that supports their argument that the parties nevertheless intended such a condition. This is not surprising. These are multiemployer trust funds.[16] Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective-bargaining agreement would have an adverse effect on the other participants.[17] The enforcement mechanisms established in the trust agreements protect the collective interests of the parties from the delinquency of individual employers by allowing the trustees to seek prompt judicial enforcement of the contribution requirements. It

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[15] Art. III, Sec. 4, of the Pension Fund Agreement, App. 22 (emphasis added).

[16] Respondents inform us that these funds are two of the largest Taft-Hartley multiemployer funds in the United States. They have roughly 500,000 participants and beneficiaries nationwide. Brief for Respondents 6, 18.

[17] Cf. *Lewis* v. *Benedict Coal Co.*, 361 U. S., at 469 ("[U]nlike the usual third-party beneficiary contract, this is an industry-wide agreement involving many promisors. . . . The application of the suggested [presumption] to this contract would require us to assume that the other [employers] . . . were willing to risk the threat of diminution of the fund in order to protect those of their number who might have become involved in local labor difficulties").

is unreasonable to infer that these parties would agree to subordinate those mechanisms to whatever arbitration procedures might be required by a particular employer's collective-bargaining agreement.[18] In the absence of evidence to the contrary, therefore, we will not infer that the parties to the two multiemployer trust funds intended to condition the trustees' enforcement authority on the arbitration procedures contained in petitioners' separate collective-bargaining agreements.

Even if we assume that the parties to the collective-bargaining agreements could negate by their agreement the powers conferred on the trustees by the broader group of parties to the trust agreements, we find no attempt to do so here. The arbitration clauses found in these collective-bargaining agreements contain no suggestion that either the petitioners or the Union intended to require arbitration of disputes between the trustees and the employers. Under the terms of those agreements, arbitration is required only of "differences that arise *between the Company and the Union or any employee of the Company* as to the meaning or application of the provisions of this agreement." App. 55 (emphasis added). Although petitioners concede that neither clause expressly requires the arbitration of disputes between the trustees and the employers, they argue that we should infer such a requirement. We see no justification for doing so.

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[18] In general, the terms of the trust agreements and the collective-bargaining agreements seem to support precisely the opposite conclusion, suggesting that conflicts between the collective-bargaining agreements and the trust agreements will be resolved in favor of the latter. The trust agreements expressly provide that "any construction [of the trust agreements] adopted by the Trustees in good faith shall be binding upon the Union, the Employees and Employers." Art. IV, Sec. 17, Pension Trust Agreement, App. 26–27. The collective-bargaining agreements, on the other hand, provide that the employer is deemed to have ratified "all actions already taken or to be taken by [the] trustees within the scope of their authority." Art. XV, Sec. 3, Prosser's Collective Bargaining Agreement, App. 76.

As petitioners concede, the collective-bargaining agreements permit only the Union or the employer to invoke the arbitration process. It is unreasonable to infer that the parties to these agreements, or to the trust agreements, intended the trustees to rely on the Union to arbitrate their disputes with the employer. Because arbitration may be expensive,[19] there is no reason to assume, without more persuasive evidence than is presented here, that the Union intended to incur such expenses at the request of the trustees and without any requirement that the trustees provide reimbursement. It is even less likely that the parties to the *trust* agreements intended to agree to such complete reliance on the Union.[20] If the Union disagreed with the trustees' construction of the agreement, it could refuse to arbitrate the claim, or compromise the trustees' position in arbitration. The outcome of any subsequent judicial proceeding could be predetermined by the outcome of arbitration.[21] We find particularly implausible petitioners' further argument that a duty of fair representation may be implied, and that this should compel the Union to pursue the trustees' uncom-

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[19] Article V, Sec. 4, of Prosser's Collective-Bargaining Agreement requires the Union to bear one-half the costs of arbitration with the employer. App. 57. The cost of arbitration is at least one reason why this Court has declined to agree that individual employees represented by the union have an absolute right to have their grievances taken to arbitration. See *Vaca* v. *Sipes*, 386 U. S. 171, 191–192 (1967). The union may exercise its discretion in good faith to settle grievances "prior to the most costly and time-consuming step in the grievance procedures." *Id.*, at 191.

[20] Indeed, the trust agreements seem to prohibit such an arrangement. Article II, Sec. 10, of the Pension Fund Agreement provides that "[n]o Employer or Union nor any representative of any Employer or Union . . . is authorized to . . . act as agent of the Trustees." App. 21.

[21] See *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S., at 596–599 ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his"). See also *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737 (1981).

promised claims through arbitration. There simply is no evidence that the Union owes any statutory or contractual duty of fair representation to the trustees.[22] In the absence of such evidence, we will not engage the unlikely inference that the parties to these agreements intended to require the trustees to rely on the Union to arbitrate their disputes with the employer.[23] Without that inference, as petitioners' concede, there is no basis for assuming that the parties intended to require arbitration of disputes between the trustees and the employer.

IV

We hold that neither the trust agreements nor the collective-bargaining agreements at issue here evidence any intent to condition the contractual right of the trustees to seek judicial enforcement of the trust provisions on exhaustion of the arbitration procedures contained in petitioners' collective-bargaining agreements. We, therefore, affirm the judgment of the Court of Appeals and remand both cases for further proceedings.

It is so ordered.

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[22] A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit. *Vaca* v. *Sipes*, *supra*, at 182; *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964). Moreover, petitioners have pointed to no evidence that suggests the parties intended to impose a *contractual* duty of fair representation on the Union.

Even if there were a duty of fair representation here, it would accord the Union wide discretion and would provide only limited protection to trust beneficiaries. A primary union objective is "to maximize overall compensation of its members." *Barrentine*, 450 U. S., at 742. Thus, it may sacrifice particular elements of the compensation package "if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Ibid.*

[23] Because there is no indication that the parties have agreed to the arrangement suggested by petitioners, we have no occasion to determine its legality.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95 ET AL. *v.* VAIL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83–87. Argued February 28, 1984—Decided April 23, 1984

706 F. 2d 1435, affirmed by an equally divided Court.

Thomas R. Miller argued the cause and filed briefs for petitioners.

Marc J. Ansel argued the cause and filed a brief for respondent.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE MARSHALL took no part in the decision of this case.

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*Briefs of *amici curiae* urging affirmance were filed for the American Association of University Professors by *Ralph S. Brown*, *Lawrence White*, *Ann H. Franke*, and *Victor J. Stone*; and for the National Education Association et al. by *Michael H. Gottesman*, *Robert M. Weinberg*, and *Charles S. Sims*.

Gwendolyn H. Gregory filed a brief for the National School Boards Association as *amicus curiae*.

CAPITAL CITIES MEDIA, INC., TDBA THE WILKES-BARRE TIMES LEADER, ET AL. *v.* TOOLE, JUDGE, COURT OF COMMON PLEAS OF LUZERNE COUNTY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 83-599. Decided April 23, 1984

Held: The Pennsylvania Supreme Court's judgment—denying a petition for a writ of prohibition with regard to respondent's orders in a criminal trial prohibiting the publishing of the jurors' names and addresses; the sketching, photographing, televising, and videotaping of the jurors during the proceedings; and the handling of trial exhibits without court permission—is vacated, and the cause is remanded for clarification of the record, which does not disclose whether the Pennsylvania Supreme Court passed on petitioners' federal constitutional claims or denied their petition on an adequate and independent state ground.

Certiorari granted; vacated and remanded.

PER CURIAM.

The proceedings below were brought to challenge an order by respondent who, in a criminal trial, barred the press and public from publishing the names and addresses of jurors. Respondent also prohibited the parties from sketching, photographing, televising, and videotaping the jurors during their service in the criminal proceedings and from handling trial exhibits without permission of the court. Petitioners filed a petition for a writ of prohibition with the Supreme Court of Pennsylvania. However, it was denied without opinion. Petitioners, arguing that they have been denied their federal constitutional rights, now urge us to grant certiorari.

As matters now stand, the record does not disclose whether the Supreme Court of Pennsylvania passed on petitioners' federal claims or whether it denied their petition for a writ of prohibition on an adequate and independent state ground. For this reason, we grant the petition for writ of

certiorari, vacate the judgment of the Supreme Court of Pennsylvania, and remand the cause to that court for such further proceedings as it may deem appropriate to clarify the record. See *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U. S. 241 (1978) *(per curiam)*; *California* v. *Krivda*, 409 U. S. 33 (1972) *(per curiam)*.

So ordered.

FLORIDA *v.* MEYERS, AKA WEYERS

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

No. 83-1279. Decided April 23, 1984

At the time of respondent's arrest for sexual battery, police officers searched his automobile and seized several items. Approximately eight hours after the car was impounded, an officer, without obtaining a warrant, searched the car a second time, seizing additional evidence. The Florida trial court denied respondent's motion to suppress the evidence seized during the second search, and respondent was convicted. The Florida District Court of Appeal reversed, holding that even though respondent conceded that the initial search of the car was valid, the second warrantless search violated the Fourth Amendment because the car had been impounded, removing the element of mobility.

Held: The Fourth Amendment was not violated by the second search of respondent's car. The justification to conduct a warrantless search of a car that has been stopped on the road—based on probable cause to believe there is evidence of crime inside it—does not vanish once the car has been impounded and immobilized. *Michigan* v. *Thomas*, 458 U. S. 259.

Certiorari granted; 432 So. 2d 97, reversed and remanded.

PER CURIAM.

Respondent was charged with sexual battery. At the time of his arrest, police officers searched his automobile and seized several items. The vehicle was then towed to Sunny's Wrecker, where it was impounded in a locked, secure area. Approximately eight hours later, a police officer went to the compound and, without obtaining a warrant, searched the car for a second time. Additional evidence was seized. At the subsequent trial, the court denied respondent's motion to suppress the evidence seized during the second search, and respondent was convicted.

On appeal, the Florida District Court of Appeal for the Fourth District reversed the conviction, holding that even

though respondent conceded that the initial search of the automobile was valid, the second search violated the Fourth Amendment. 432 So. 2d 97 (1983). The court concluded that *Chambers* v. *Maroney*, 399 U. S. 42 (1970), in which this Court held that police officers who have probable cause to believe there is contraband inside an automobile that has been stopped on the road may search it without obtaining a warrant, was distinguishable, stating that "in this case the element of mobility was removed because [respondent's] vehicle had been impounded." 432 So. 2d, at 99. The Florida Supreme Court denied the State's petition for discretionary review, and the State filed the present petition for certiorari. We reverse.*

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*Even though the District Court of Appeal remanded the case for a new trial, its decision on the federal constitutional issue is reviewable at this time because if the State prevails at the trial, the issue will be mooted; and if the State loses, governing state law, Fla. Stat. § 924.07 (1981); *State* v. *Brown*, 330 So. 2d 535, 536 (Fla. App. 1976), will prohibit it from presenting the federal claim for review. In such circumstances, we have consistently held that "the decision below constitute[s] a final judgment under 28 U. S. C. § 1257(3)." *California* v. *Stewart*, decided with *Miranda* v. *Arizona*, 384 U. S. 436, 497, 498, n. 71 (1966). See *South Dakota* v. *Neville*, 459 U. S. 553, 558, n. 6 (1983); *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U. S. 156, 159–164 (1973). See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 481 (1975).

Respondent contends that we should not review the issue raised by petitioner because "the appellate court reversed [respondent's] conviction on two independent grounds, one of which (restricted cross-examination) petitioner does not contest." Brief in Opposition 2. To the extent that this is an argument that the lower court's judgment is unreviewable because it rests on adequate and independent state grounds, we reject it. First, it is highly questionable whether the District Court of Appeal would have reversed the conviction had it not reversed the trial court's ruling on the suppression motion. The court did state that respondent's cross-examination of the victim had been unduly restricted by the trial court. However, the court's short discussion of this issue was introduced by the observation that "[s]ince the case must be remanded for a new trial we briefly mention another appellate point." 432 So. 2d, at 99. This is hardly a clear indication

The District Court of Appeal either misunderstood or ignored our prior rulings with respect to the constitutionality of the warrantless search of an impounded automobile. In *Michigan* v. *Thomas*, 458 U. S. 259 (1982), we upheld a warrantless search of an automobile even though the automobile was in police custody and even though a prior inventory search had already been made. That ruling controls the disposition of this case. In *Thomas*, we expressly rejected the argument accepted by the District Court of Appeal in the present case, noting that the search upheld in *Chambers* was conducted "after [the automobile was] impounded and [was] in police custody" and emphasizing that "the justification to conduct such a warrantless search does not vanish once the car has been immobilized." 458 U. S., at 261. The District Court of Appeal's ruling that the subsequent search in this case was invalid because the car had been impounded is clearly inconsistent with *Thomas* and *Chambers*. The petition for certiorari is therefore granted, the judgment of the

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that the cross-examination ruling provided an independent and adequate basis for reversal of the conviction. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

Moreover, even if the cross-examination ruling did provide an independent state ground for reversal, we would still be empowered to review the constitutional issue raised by petitioner. The reason we cannot review a state-court judgment resting on adequate and independent state grounds is that "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945). In the present case, there is no possibility that our opinion will be merely advisory. Even if the District Court of Appeal were to order a new trial solely on the basis of its cross-examination ruling, the admissibility of critical evidence at that trial hinges on the constitutional issue presented for review by petitioner. Thus, our resolution of that issue will affect the proceedings below regardless of how the District Court of Appeal rules on remand. In such circumstances there is no jurisdictional reason why we cannot address the issue presented to us.

District Court of Appeal is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

No judicial system is perfect. In this case the Florida District Court of Appeal for the Fourth District appears to have made an error. In the exercise of its discretion, the Florida Supreme Court elected not to correct that error. No reasons were given for its denial of review and since the record is not before us, we cannot know what discretionary factors may have prompted the Florida Supreme Court's decision. This Court, however, finds time to correct the apparent error committed by the intermediate appellate court, acting summarily without benefit of briefs on the merits or argument.

"This Court can only deal with a certain number of cases on the merits in any given Term, and therefore some judgment must attend the process of selection." *Torres-Valencia* v. *United States*, 464 U. S. 44 (1983) (REHNQUIST, J., dissenting). If the error corrected today had been committed by a federal court, the Court's action arguably would be a proper exercise of its supervisory powers over the federal judicial system. See this Court's Rule 17.1(a). Or if the case raised a novel question of federal law on which there was a divergence of opinion, arguably it would be proper for the Court to assume jurisdiction for the purpose of clarifying the law. See this Court's Rules 17.1(b) and (c). Or if there were reason to believe that the state court refused to apply federal precedent because of its hostility to this Court's interpretation of the Constitution, see generally *Cooper* v. *Aaron*, 358 U. S. 1 (1958), we might have an obligation to act summarily to vindicate the supremacy of federal law. No such consideration is present in this case. In fact, the case on which the majority principally relies, *Michigan* v. *Thomas*, 458 U. S.

259 (1982) *(per curiam)*, was itself a summary disposition. Clearly, the law in this area is well settled. That being the case, I see no reason why we cannot leave to the Florida Supreme Court the task of managing its own discretionary docket.[1]

For three other reasons I believe the Court should deny certiorari in cases of this kind. First, our pronouncements

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[1] The Court does, however, manage to inject legal significance into this otherwise unremarkable case through its discussion of whether the judgment below rests on an independent and adequate state ground. *Ante*, at 381–382, n. The Florida District Court of Appeal found that two errors had been committed by the trial court, one on the Fourth Amendment question and another on a state-law ground regarding the scope of respondent's cross-examination of the complaining witness. This Court states that there is federal jurisdiction in this case because the Florida District Court of Appeal did not provide "a clear indication that the cross-examination ruling provided an independent and adequate basis for reversal of the conviction," *ibid.*, and relies on the "clear statement" rule of *Michigan* v. *Long*, 463 U. S. 1032, 1040–1042 (1983). This is what *Long* held:

"[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Id.*, at 1040–1041.

In effect, *Long* created a presumption of jurisdiction when the state decision rests "primarily on" or is "interwoven with" federal law. See *id.*, at 1042, and n. 8. Here, the cross-examination ruling in no sense "rested on" or was "interwoven with" federal law. Yet today, by its citation of *Long*, the Court implies that all state courts have some sort of duty to make a plain statement that even their indisputably state-law decisions are independent of any federal question in the case. This apparent extension of *Long* occurs without briefs on the merits or argument; in fact petitioner does not even cite *Long*. It is all the more puzzling since the last paragraph in the Court's footnote is sufficient to support the exercise of jurisdiction over this case without any reliance on *Long*.

concerning our confidence in the ability of the state judges to decide Fourth Amendment questions, see *Allen* v. *McCurry*, 449 U. S. 90 (1980); *Stone* v. *Powell*, 428 U. S. 465 (1976), are given a hollow ring when we are found peering over their shoulders after every misreading of the Fourth Amendment. Second, our ability to perform our primary responsibilities can only be undermined by enlarging our self-appointed role as supervisors of the administration of justice in the state judicial systems. Dispositions such as that today can only encourage prosecutors to file in increasing numbers petitions for certiorari in relatively routine cases, and if we take it upon ourselves to review and correct every incorrect disposition of a federal question by every intermediate state appellate court, we will soon become so busy that we will either be unable to discharge our primary responsibilities effectively, or else be forced to make still another adjustment in the size of our staff in order to process cases effectively. We should focus our attention on methods of using our scarce resources wisely rather than laying another course of bricks in the building of a federal judicial bureaucracy.

Third, and perhaps most fundamental, this case and cases like it pose disturbing questions concerning the Court's conception of its role. Each such case, considered individually, may be regarded as a welcome step forward in the never-ending war against crime. Such decisions are certain to receive widespread approbation, particularly by members of society who have been victimized by lawless conduct. But we must not forget that a central purpose of our written Constitution, and more specifically of its unique creation of a life-tenured federal judiciary, was to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State Governments. As I wrote last Term: "I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard." *Michigan* v. *Long*, 463 U. S. 1032, 1068 (1983) (emphasis in original) (dissenting opinion). Yet the Court's recent history indicates that, at

least with respect to its summary dispositions, it has been primarily concerned with vindicating the will of the majority and less interested in its role as a protector of the individual's constitutional rights.[2] Since the beginning of the October 1981 Term, the Court has decided in summary fashion 19 cases, including this one, concerning the constitutional rights of persons accused or convicted of crimes. All 19 were decided on the petition of the warden or prosecutor, and in all he was successful in obtaining reversal of a decision upholding a claim of constitutional right.[3] I am not saying that none of these cases should have been decided summarily. But I am saying that this pattern of results, and in particular the fact that in its last two and one-half Terms the Court has been unwilling in even a single criminal case to employ its discretionary power of summary disposition in order to uphold a claim of constitutional right, is quite striking. It may well be true that there have been times when the Court

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[2] This trend, unfortunately, does not appear to be limited to the Court's summary dispositions. See *Long*, 463 U. S., at 1069–1070, and n. 3 (STEVENS, J., dissenting).

[3] The cases, other than this one, are: *Rushen* v. *Spain*, 464 U. S. 114 (1983) *(per curiam)*; *Wainwright* v. *Goode*, 464 U. S. 78 (1983) *(per curiam)*; *California* v. *Beheler*, 463 U. S. 1121 (1983) *(per curiam)*; *Illinois* v. *Batchelder*, 463 U. S. 1112 (1983) *(per curiam)*; *Maggio* v. *Fulford*, 462 U. S. 111 (1983) *(per curiam)*; *Cardwell* v. *Taylor*, 461 U. S. 571 (1983) *(per curiam)*; *Wyrick* v. *Fields*, 459 U. S. 42 (1982) *(per curiam)*; *Anderson* v. *Harless*, 459 U. S. 4 (1982) *(per curiam)*; *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982) *(per curiam)*; *Michigan* v. *Thomas*, 458 U. S. 259 (1982) *(per curiam)*; *Fletcher* v. *Weir*, 455 U. S. 603 (1982) *(per curiam)*; *Sumner* v. *Mata*, 455 U. S. 591 (1982) *(per curiam)*; *Wainwright* v. *Torna*, 455 U. S. 586 (1982) *(per curiam)*; *Hutto* v. *Davis*, 454 U. S. 370 (1982) *(per curiam)*; *Harris* v. *Rivera*, 454 U. S. 339 (1981) *(per curiam)*; *Leeke* v. *Timmerman*, 454 U. S. 83 (1981) *(per curiam)*; *Jago* v. *Van Curen*, 454 U. S. 14 (1981) *(per curiam)*; *Duckworth* v. *Serrano*, 454 U. S. 1 (1981) *(per curiam)*. See also *Board of Ed. of Rogers, Ark.* v. *McCluskey*, 458 U. S. 966, 972–973 (1982) (STEVENS, J., dissenting).

overused its power of summary disposition to protect the citizen against government overreaching. Nevertheless, the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor. The Framers surely feared the latter more than the former.

I respectfully dissent.

WESTINGHOUSE ELECTRIC CORP. *v.* TULLY ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 81-2394. Argued November 1, 1983—Decided April 24, 1984

The Internal Revenue Code of 1954 (IRC) was amended in 1971 to provide tax incentives for United States firms to increase their exports, and for that purpose special tax treatment was provided for a "Domestic International Sales Corporation" ("DISC"), a corporation substantially all of whose assets and gross receipts are export-related. Under the IRC, a DISC is not taxed on its income, but instead a portion (50% for the tax years in question in this case) of its income—"deemed distributions"—is attributed to its shareholders whether or not actually paid or distributed to them. Taxes on the remaining income—"accumulated DISC income"—are deferred until that income is actually distributed to shareholders or the DISC no longer qualifies for special tax treatment. In response to these amendments, the New York Legislature enacted a franchise tax statute requiring the consolidation of the receipts, assets, expenses, and liabilities of a subsidiary DISC with those of its parent corporation. The franchise tax is assessed against the parent on the basis of the consolidated amounts. The statute also provides for an offsetting tax credit, the result of which is to lower the effective tax rate on the accumulated DISC income included in the consolidated return to 30% of the otherwise applicable rate. The credit is limited to gross receipts from export products "shipped from a regular place of business of the taxpayer within [New York]." The credit is computed by (1) dividing the DISC's gross receipts from property shipped from a regular place of business in New York by its total gross receipts from the sale of export property; (2) multiplying that quotient (the DISC's export ratio) by the parent's New York business allocation percentage; (3) multiplying that product by the New York tax rate applicable to the parent; (4) multiplying that product by 70%; and (5) multiplying that product by the parent's attributable share of the DISC's accumulated income. Appellant Westinghouse Electric Corporation, a manufacturer of electrical products that is qualified to do business in New York, has a wholly owned subsidiary, Westinghouse Electric Export Corporation (Westinghouse Export), that qualifies as a federally tax-exempt DISC. On its 1972 and 1973 New York franchise tax returns, appellant included as income an amount of deemed distributed income equal to about half of Westinghouse Export's income, but did not include its accumulated income. The

New York State Tax Commission sought to include the accumulated DISC income, computing appellant's taxable income by first combining all of Westinghouse Export's income with that of appellant, and then giving appellant the benefit of the DISC export credit for the 5% of Westinghouse Export's receipts each year that could be attributed to New York shipments. The Commission denied relief on appellant's petition for redetermination of the resulting tax deficiencies. Ultimately, after appellant had mixed success in the Appellate Division of the New York Supreme Court on its federal constitutional challenges to the New York taxing scheme, the New York Court of Appeals reinstated the Tax Commission's determination. Rejecting appellant's claim that the tax credit impermissibly subjected its export sales from a non-New York place of business to a higher tax rate than that on comparable sales shipped from a regular place of business in New York, the court held that the tax credit simply forgives a portion of the tax New York has a right to levy, such portion being determined by reference to shipments of export property from a regular place of business in New York, that this method satisfied due process, and that any effect on interstate commerce was too indirect to violate the Commerce Clause.

Held: The manner in which New York allows corporations a tax credit on the accumulated income of their subsidiary DISCs discriminates against export shipping from other States, in violation of the Commerce Clause. Pp. 398–407.

(a) It is the second adjustment of the credit to reflect the DISC's New York export ratio, made only to the credit and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York. This adjustment allows a parent a greater tax credit on its accumulated DISC income as its subsidiary DISC moves a greater percentage of its shipping activities into New York. Conversely, the adjustment decreases the tax credit allowed to the parent for a given amount of its DISC's shipping activities conducted from New York as the DISC increases its shipping activities in other States. Thus, the New York tax scheme not only provides an incentive for increased business activity in New York, but also penalizes increases in the DISC's shipping activities in other States. Pp. 399–401.

(b) A State cannot circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate—as is the New York franchise tax—rather than on individual transactions. Nor may a State encourage the development of local industry

by means of taxing measures that invite a multiplication of preferential trade areas within the United States, in contravention of the Commerce Clause. Whether the New York tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that "forecloses tax-neutral decisions and . . . creates . . . an advantage" for firms operating in New York by placing "a discriminatory burden on commerce to its sister States." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 331. Pp. 402–407.

55 N. Y. 2d 364, 434 N. E. 2d 1044, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Paul M. Dodyk argued the cause for appellant. With him on the briefs was *David A. Barrett.*

Peter H. Schiff argued the cause for appellees. With him on the brief were *Robert Abrams*, Attorney General of New York, and *Francis V. Dow*, Assistant Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, we are confronted with the question of the constitutionality of a franchise tax credit afforded by the State of New York to certain income of Domestic International Sales Corporations.

I

The tax credit in issue was enacted as part of the New York Legislature's response to additions to and changes in the United States Internal Revenue Code of 1954 effectuated by the Revenue Act of 1971, Pub. L. 92–178, §§ 501–507, 85 Stat. 535. In an effort to "provide tax incentives for U. S. firms to increase their exports," H. R. Rep. No. 92–533, p. 9 (1971); S. Rep. No. 92–437, p. 12 (1971), Congress gave special recognition to a corporate entity it described as a "Domestic International Sales Corporation" or "DISC." §§ 991–997 of the Code, 26 U. S. C. §§ 991–997. A corporation qualifies as a DISC if substantially all its assets and

**George Deukmejian*, Attorney General, and *Charles C. Kobayashi*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae*.

gross receipts are export-related. §§ 992(a), 993.[1] Under federal law, a DISC is not taxed on its income. § 991. Instead, a portion of the DISC's income—labeled "deemed distributions"—is attributed to the DISC's shareholders[2] on a

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[1] Specifically, § 992(a)(1) provides that a corporation qualifies for DISC treatment for any taxable year in which it

"is incorporated under the laws of any State and satisfies the following conditions for the taxable year:

"(A) 95 percent or more of the gross receipts (as defined in section 993(f)) of such corporation consist of qualified export receipts (as defined in section 993(a)),

"(B) the adjusted basis of the qualified export assets (as defined in section 993(b)) of the corporation at the close of the taxable year equals or exceeds 95 percent of the sum of the adjusted basis of all assets of the corporation at the close of the taxable year,

"(C) such corporation does not have more than one class of stock and the par or stated value of its outstanding stock is at least $2,500 on each day of the taxable year, and

"(D) the corporation has made an election pursuant to subsection (b) to be treated as a DISC and such election is in effect for the taxable year."

Under § 993(a)(1), "the qualified export receipts of a corporation are—

"(A) gross receipts from the sale, exchange, or other disposition of export property,

"(B) gross receipts from the lease or rental of export property, which is used by the lessee of such property outside the United States,

"(C) gross receipts for services which are related and subsidiary to any qualified sale, exchange, lease, rental, or other disposition of export property by such corporation,

"(D) gross receipts from the sale, exchange, or other disposition or qualified export assets (other than export property),

"(E) dividends (or amounts includible in gross income under section 951) with respect to stock of a related foreign export corporation (as defined in subsection (e)),

"(F) interest on any obligation which is a qualified export asset,

"(G) gross receipts for engineering or architectural services for construction projects located (or proposed for location) outside the United States, and

"(H) gross receipts for the performance of managerial services in furtherance of the production of other qualified export receipts of a DISC."

[2] The majority of DISCs have only one shareholder, for most are wholly owned by a single corporate parent. Internal Revenue Service, 3 Statistics of Income Bulletin, No. 2, p. 10 (1983).

current basis, whether or not that portion is actually paid or distributed to them. § 995. Under the statutory provisions in effect during the calendar years 1972 and 1973 (the tax years in question in this case), 50% of a DISC's income was deemed distributed to its shareholders. 85 Stat. 544.[3] Taxes on the remaining income of the DISC—labeled "accumulated DISC income"—are *deferred* until either that accumulated income is actually distributed to the shareholders or the DISC no longer qualifies for special tax treatment. § 996 of the Code, 26 U. S. C. § 996.

Enactment of the federal DISC legislation caused revenue officials in the State of New York some concern. New York does not generally impose its franchise tax on distributions received by a parent from a subsidiary; instead, the subsidiary is taxed directly to the extent it does business in the State. See N. Y. Tax Law § 208.9(a)(1) (McKinney 1966). Given the State's tax structure, had New York followed the federal lead in not taxing DISCs, a DISC's income would not have been taxed by the State. See New York State Division of the Budget, Report on A. 12108–A and S. 10544, pp. 1, 5–6 (May 23, 1972), reprinted in Bill Jacket of 1972 N. Y. Laws, ch. 778, pp. 13, 17–18 (Budget Report). A budget analyst reported to the legislature that if no provision were made to tax DISCs, New York might suffer revenue losses of as much as $20–$30 million annually. *Id.*, at 20. On the other hand, the analyst warned that state taxation of DISCs would dis-

[3] Subsequent to the tax years in question, the law governing DISCs was changed to decrease the amount of DISC income given preferential treatment. The Tax Reform Act of 1976, Pub. L. 94–455, § 1101(a), 90 Stat. 1655, limited DISC benefits to taxable income attributable to gross receipts in excess of 67% of the average export gross receipts in a 4-year base period. DISCs with adjusted taxable income of $100,000 or less are exempt from that provision. §§ 995(e)(3) and (f) of the Code, 26 U. S. C. §§ 995(e)(3) and (f). The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, § 204(a), 96 Stat. 423, increased from 50% to 57.5%, for tax years beginning in 1983, the portion of DISC income deemed distributed to the DISC's shareholders. § 291(a)(4) of the Code, 26 U. S. C. § 291(a)(4).

courage their formation in New York and also discourage the manufacture of export goods within the State. *Id.*, at 18.[4]

With these conflicting considerations in mind, New York enacted legislation pertaining to the taxation of DISCs. 1972 N. Y. Laws, chs. 778 and 779 (McKinney), codified as N. Y. Tax Law §§ 208 to 219–a (McKinney Supp. 1983–1984). The enacted provisions require the consolidation of the receipts, assets, expenses, and liabilities of the DISC with those of its parent. § 208.9(i)(B). The franchise tax is then assessed against the parent on the basis of the consolidated amounts. In an attempt to "provide a positive incentive for increased business activity in New York State," however, the legislature provided a "partially offsetting tax credit." Budget Report, at 18. The result of the credit is to lower the effective tax rate on the accumulated DISC income reflected in the consolidated return to 30% of the otherwise applicable franchise tax rate. The DISC credit, significantly, is limited to gross receipts from export products "shipped from a regular place of business of the taxpayer within [New York]." § 210.13(a)(2). The credit is computed by (1) dividing the gross receipts of the DISC derived from export property shipped from a regular place of business within New York by the DISC's total gross receipts derived from the sale of export property; (2) multiplying that quo-

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[4] The State considered two possible methods of DISC taxation. Under the first, a DISC would be taxed directly on its income. Use of this method would encourage formation of DISCs outside the State, so that New York would obtain no tax revenue from them. A direct tax on DISCs would also engender administrative costs. In general, New York uses federal taxable income as the base from which to determine income taxable by the State. Since a DISC would have no federal taxable income, a method of determining a DISC's taxable income for state-tax purposes would have to be devised. Budget Report, at 18.

Under the second method, a DISC's income would be attributed to the DISC's shareholders and taxed as income to them. New York revenue officials feared that full taxation of the DISC's income in this manner would discourage the manufacture of export products within the State. *Ibid.*

tient (the DISC's New York export ratio) by the parent's New York business allocation percentage;[5] (3) multiplying that product by the New York tax rate applicable to the parent; (4) multiplying that product by 70%; and (5) multiplying that product by the parent's attributable share of the accumulated income of the DISC for the year. §§ 210.13(a)(2) to (5).

II

The basic facts are stipulated. Appellant Westinghouse Electric Corporation (Westinghouse) is a Pennsylvania corporation engaged in the manufacture and sale of electrical equipment, parts, and appliances. Westinghouse is qualified to do business in New York, and it regularly pays corporate income and franchise taxes to that State. Among Westinghouse's subsidiaries is Westinghouse Electric Export Corporation (Westinghouse Export), a Delaware corporation wholly owned by Westinghouse, that qualifies as a federally tax-exempt DISC. Westinghouse Export acts as a commission agent on behalf of both Westinghouse and Westinghouse's other affiliates for export sales of products manufactured in the United States and services related to those products. All of Westinghouse Export's income in 1972 and 1973 consisted of commissions on export sales. On both its 1972 and 1973 federal income and New York State franchise tax returns, Westinghouse included as income, and paid taxes on, an amount of deemed distributed income equal to about half of Westinghouse Export's income. In 1972, Westinghouse Export's income was about $26 million, and Westinghouse included in its consolidated return approximately $13 million of income deemed distributed from

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[5] A corporation's business allocation percentage for New York tax purposes is computed according to a formula set forth in N. Y. Tax Law § 210.3 (McKinney Supp. 1983–1984). The percentage is, basically, the average of the percentages of the corporation's property situated, income earned, and payroll distributed within the State.

Westinghouse Export.[6] In 1973, the income of Westinghouse Export was approximately $58 million; Westinghouse reported almost $30 million of that amount as deemed distributed income.[7] Westinghouse, however, did not include the DISC's *accumulated* income in its consolidated returns.

The appellees, as the New York State Tax Commission (Tax Commission), sought to include in Westinghouse's consolidated income the accumulated DISC income; that is, the Tax Commission computed Westinghouse's taxable income by first combining all of Westinghouse Export's income with that of Westinghouse, pursuant to N. Y. Tax Law § 208.9(i)(B) (McKinney Supp. 1983–1984). The Commission gave Westinghouse the benefit of the DISC export credit for the approximately 5% of Westinghouse Export's receipts each year that could be attributed to New York shipments.[8] After applying the relevant allocation and tax percentages, the Tax Commission asserted deficiencies in Westinghouse's franchise tax of $73,970 (later corrected to $71,970) plus interest for 1972 and $151,437 plus interest for 1973. App. 42, 46.

Westinghouse filed a petition for redetermination of the proposed deficiencies. By its petition, as later perfected, Westinghouse contended that by requiring it to compute its franchise tax liability on a consolidated basis with Westinghouse Export, the Tax Commission was taxing income that did not have a jurisdictional nexus to the State, in violation of

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[6] More precisely, Westinghouse Export's reported income for 1972 was $25,987,000. The amount of the deemed distribution for 1972 was $12,956,500. App. 43.

[7] Westinghouse Export's reported income for 1973 was $57,948,738. The amount of the deemed distribution for 1973 was $29,838,006. *Ibid.*

[8] The Tax Commission was willing to allow Westinghouse a $2,569.77 credit for the 4.771297% of Westinghouse Export's 1972 receipts attributable to goods shipped from New York ports, and a $6,098.22 credit for the 5.523182% of the DISC's 1973 receipts attributable to New York shipments. *Id.*, at 46.

the Commerce and Due Process Clauses of the United States Constitution. Westinghouse further contended that limiting the tax benefit of the DISC export credit to gross receipts from shipments attributable to a New York place of business violated the Commerce, Due Process, and Equal Protection Clauses. The Commission declined to entertain Westinghouse's contentions, on the ground that, as an administrative agency, it lacked jurisdiction to pass upon "the constitutionality of the laws of the State of New York." *Id.*, at 47.

Westinghouse then brought suit in the New York Supreme Court for review of the tax determination, again raising its constitutional claims. The case was transferred to the Appellate Division. That court, by a 3-to-2 vote, found the portion of the law that requires accumulated income of the DISC to be added to the consolidated return, § 208.9(i)(B), to be an unconstitutional burden on foreign commerce. 82 App. Div. 2d 988, 440 N. Y. S. 2d 397 (1981). The Appellate Division based its holding on the fact that Congress intended to exempt DISC income from current taxation. *Id.*, at 989, 440 N. Y. S. 2d, at 399–400. This decision made it unnecessary for the court to consider the constitutionality of New York's geographical limitation on the DISC export credit, because the credit applies only to accumulated DISC income. The Appellate Division, however, went on to reject Westinghouse's constitutional challenges to New York's taxation of deemed distributed income. *Ibid.*, 440 N. Y. S. 2d, at 400.

The Tax Commission took an appeal to the New York Court of Appeals from that portion of the Appellate Division's judgment invalidating § 208.9(i)(B), and Westinghouse cross-appealed from that portion of the judgment upholding the taxation of deemed distributions. Westinghouse again made the constitutional arguments it had raised below. In a unanimous opinion, the Court of Appeals reinstated the determination of the Tax Commission. 55 N. Y. 2d 364, 434 N. E. 2d 1044 (1982). The Court of Appeals first held that Congress' decision not to tax DISCs at the federal level did

not pre-empt a State from taxing a DISC. *Id.*, at 372–373, 434 N. E. 2d, at 1047–1048. The court also rejected Westinghouse's argument that the State lacked the jurisdictional nexus necessary to satisfy the minimal due process standards on which the right to tax must be predicated. Finally, the court rejected Westinghouse's claim that the credit provided for in § 210.13(a) impermissibly subjected Westinghouse's export sales from a non-New York place of business to a higher tax rate than that on comparable sales shipped from a regular place of business in New York. The court noted that the credit was devised by the State to provide shareholders of DISCs with state-tax incentives akin to those enacted by Congress. The only difference was that, while Congress had chosen to provide the benefit in the form of a tax deferral, the New York Legislature had elected to use a credit. *Id.*, at 374–376, 434 N. E. 2d, at 1049–1050.

The court acknowledged that the credit was intended to ensure that New York would not lose its competitive position vis-à-vis other States, since other States were also expected to offer tax benefits to DISCs. It traced the steps required in calculating the tax credit and concluded: "Obviously, the business allocation percentage plays an integral role in computing the tax credit." *Id.*, at 375, 434 N. E. 2d, at 1050. Use of the business allocation percentage, the court reasoned, ensures that in taxing DISC income, the State is taxing only that DISC income that has a jurisdictional nexus with the State. The credit simply forgives a portion of the tax New York has a right to levy. *Id.*, at 376, 434 N. E. 2d, at 1050. The portion of the tax to be forgiven is determined by reference to shipments of export property from a regular place of business in New York. The court was of the opinion that this method satisfies due process and that any effect on interstate commerce is too indirect to run afoul of the Commerce Clause. *Ibid.*

We noted probable jurisdiction only with respect to the question of the constitutionality of the DISC tax credit, 459

U. S. 1144 (1983), and we now reverse the judgment of the New York Court of Appeals in that respect.

III

The Tax Commission seeks to convince us that the DISC tax credit forgives merely a portion of the tax that New York has jurisdiction to levy. All the accumulated income of a DISC is attributed to its parent for tax purposes. Under unitary tax principles, however, if the parent has a regular place of business outside New York, the State will not actually tax the full amount of the accumulated income. Only a portion of the parent's net income (which includes the accumulated DISC income) will be subject to tax in New York. That portion is determined by reference to a business allocation percentage determined by averaging the percentages of in-state property, payroll, and receipts. See N. Y. Tax Law § 210.3 (McKinney Supp. 1983–1984). This Court long has upheld, subject to certain restraints, the use of a formula-apportionment method to determine the percentage of a business' income taxable in a given jurisdiction. *Container Corp.* v. *Franchise Tax Board*, 463 U. S. 159, 169–171 (1983); see *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157 (1940); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123 (1931); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920).

The Tax Commission's argument that New York employs a constitutionally acceptable allocation formula, in our view, serves only to obscure the issue in this case. The acceptability of the allocation formula employed by the State of New York is not relevant to the question before us. The fact that New York is attempting to tax only a fairly apportioned percentage of a DISC's accumulated income does not insulate from constitutional challenge the State's method of allowing the DISC export credit. New York's apportionment procedure determines what portion of a business' income is within the jurisdiction of New York. Nothing about the apportion-

ment process releases the State from the constitutional restraints that limit the way in which it exercises its taxing power over the income within its jurisdiction.

Here, Westinghouse argues that the State of New York has sought to exercise its taxing power over accumulated DISC income in a manner that offends the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. This challenge is not foreclosed by our holding that New York's allocation of DISC income is constitutionally acceptable. See 459 U. S. 1144 (1983) (dismissing for want of a substantial federal question Westinghouse's challenge to method of allocating DISC income to parent). "Fairly apportioned" and "nondiscriminatory" are not synonymous terms. It is to the question whether the method of allowing the credit is discriminatory in a manner that violates the Commerce Clause that we now turn.

The Tax Commission argues that multiplying the allowable credit by the New York export ratio of the DISC merely ensures that the State is not allowing a parent corporation to claim a tax credit with respect to DISC income that is not taxable by the State of New York. This argument ignores the fact that the percentage of the DISC's accumulated income that is subject to New York franchise tax is determined by the parent's business allocation percentage, not by the export ratio. In computing the allowable credit, the statute requires the parent to factor in its business allocation percentage. §210.13(a). This procedure alleviates the State's fears that it will be overly generous with its tax credit, for once the adjustment of multiplying the allowable DISC export credit by the parent's business allocation percentage has been accomplished, the tax credit has been fairly apportioned to apply only to the amount of the accumulated DISC income taxable to New York. From the standpoint of fair apportionment of the credit, the additional adjustment of the credit to reflect the DISC's New York export ratio is both inaccurate and duplicative.

It is this second adjustment, made only to the credit and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York. This adjustment has the effect of allowing a parent a greater tax credit on its accumulated DISC income as its subsidiary DISC moves a greater percentage of its shipping activities into the State of New York. Conversely, the adjustment decreases the tax credit allowed to the parent for a given amount of its DISC's shipping activity conducted from New York as the DISC increases its shipping activities in other States.[9] Thus, not only does the New York tax scheme

[9] Hypothetical examples demonstrate that similarly situated corporations, each operating a wholly owned DISC, would face different tax assessments in New York depending on the location from which the DISC shipped its exports. For a parent corporation that has an income of $10,000, a wholly owned DISC with accumulated income of $500, and a New York business allocation percentage of 40%, and assuming an applicable New York tax rate of 10%, Table A shows the difference in New York tax liability in situations where the DISC ships 100%, 50%, or 0% of its exports from locations in New York:

TABLE A

% of DISC Shipment from New York	100%	50%	0%
Parent's Income	$10,000	$10,000	$10,000
DISC Accumulated Income	500	500	500
Consolidated Income	10,500	10,500	10,500
New York Business Allocation %	40%	40%	40%
Income Taxable by New York	4,200	4,200	4,200
New York Tax Rate	10%	10%	10%
Tax Liability (Pre-Credit)	420	420	420
DISC Credit Allowed	14	7	0
Final Tax Assessment	406	413	420

The DISC credit allowed is computed by multiplying the percentage of the DISC's export revenues derived from New York shipments (100%, 50% or 0%) by the parent's New York business allocation percentage (40%); multiplying that product by the parent's New York tax rate (10%); multiplying

"provide a positive incentive for increased business activity in New York State," Budget Report, at 18, but also it penalizes increases in the DISC's shipping activities in other States.

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that product by the credit percentage (70%); and, finally, multiplying that product by the amount of the accumulated DISC income attributable to the parent ($500).

We are not unmindful of one factor that results when a corporation is induced to move more of its export business into the State of New York: the parent's business allocation percentage will be adjusted upward to reflect the increased percentage of DISC activity in the State. The increased tax liability will more than offset the increased credit, so that the parent's tax liability to the State of New York, in absolute terms, increases. The parent's effective New York tax rate, however, decreases as its DISC does a greater percentage of its shipping from New York. In the next example, each parent is assumed to do 40% of its own business from New York, so that $4,000 of its income is attributable to New York activity. Each DISC has $500 of accumulated income, but differs from the others in terms of the percentage of its income that results from shipping exports from New York ports. Assuming that the same amount of payroll and property are required to generate each dollar of the DISC's income, the business allocation percentage increases proportionately as the percentage of the DISC's income derived from New York shipping activity increases:

TABLE B

% of DISC Shipment from New York	100%	50%	0%
Parent's Income	$10,000	$10,000	$10,000
DISC Accumulated Income	500	500	500
Consolidated Income	10,500	10,500	10,500
New York Business Allocation %	42.86%	40.48%	38.10%
Income Taxable by New York	4,500	4,250	4,000
New York Tax Rate	10%	10%	10%
Tax Liability (Pre-Credit)	450	425	400
DISC Credit Allowed	15	7	0
Final Tax Assessment	435	418	400
Effective Tax Rate on Income Taxable in New York	9.67%	9.84%	10%

The third example demonstrates the most pernicious effect of the credit scheme. In this example, each parent and its DISC maintain the same

In determining whether New York's method of allowing a DISC export credit violates the Commerce Clause, the foundation of our analysis is the basic principle that "'[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 328 (1977), quoting *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944);

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amount of business in New York as do the other parent-DISC organizations, but the DISCs differ with respect to the amount of export shipping they do from outside New York. Each parent has $10,000 of income and each does 40% of its own business in New York. In addition, each DISC ships the goods that account for $3,000 of its income from New York. The only difference among the three parent-DISC organizations is the amount of DISC activity each conducts outside New York. As the DISC conducts a greater amount of shipping from outside New York, the DISC export credit allowed the parent decreases. Thus, New York lowers the incentive it awards for in-state DISC activity as the DISC increases its out-of-state activity:

TABLE C

% of DISC Shipment from New York	100%	75%	60%
DISC Accumulated Income from New York Shipments	$3,000	$3,000	$3,000
DISC Accumulated Income from Shipments from Other States	0	1,000	2,000
Total DISC Accumulated Income	3,000	4,000	5,000
Parent's Income	10,000	10,000	10,000
Consolidated Income	13,000	14,000	15,000
New York Business Allocation %	53.85%	50%	46.67%
Income Taxable by New York	7,000	7,000	7,000
New York Tax Rate	10%	10%	10%
Tax Liability (Pre-credit)	700	700	700
DISC Credit Allowed	113	105	98
Final Tax Assessment	587	595	602

These examples illustrate what is inherent in the method devised by the New York Legislature for computing the DISC credit: the credit is awarded in a discriminatory manner on the basis of the percentage of a DISC's shipping conducted from within the State of New York.

accord, *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976). The undisputed corollary of that principle is that "'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States,'" including the States' power to tax. *Boston Stock Exchange*, 429 U. S., at 328, quoting *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946). For that reason, "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange*, 429 U. S., at 329, quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959). See also *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64 (1963); *Nippert* v. *Richmond*, 327 U. S. 416 (1946); *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113 (1908); *Guy* v. *Baltimore*, 100 U. S. 434 (1880); *Welton* v. *Missouri*, 91 U. S. 275 (1876).

We have acknowledged that the delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requires a case-by-case analysis and that such analysis has left "'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Boston Stock Exchange*, 429 U. S., at 329, quoting *Northwestern States*, 358 U. S., at 457. In light of our decision in *Boston Stock Exchange*, however, we think that there is little room for such "controversy and confusion" in the present litigation. The lessons of that case, as explicated further in *Maryland* v. *Louisiana*, 451 U. S. 725 (1981), are controlling.

In both *Maryland* v. *Louisiana* and *Boston Stock Exchange*, the Court struck down state tax statutes that

encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on similar activities within the State. In *Maryland* v. *Louisiana*, the Court held that Louisiana's "First-Use" tax—which imposed a tax on natural gas brought into the State while giving local users a series of exemptions and credits—violated the Commerce Clause because it "unquestionably discriminate[d] against interstate commerce in favor of local interests." 451 U. S., at 756. Similarly, in *Boston Stock Exchange*, the Court held unconstitutional a New York stock-transfer tax that reduced the tax payable by nonresidents when the tax involved an in-state (rather than an out-of-state) sale and applied a maximum limit to the tax payable on any in-state (but not out-of-state) sale. See 429 U. S., at 332. The stock-transfer tax was declared unconstitutional because it violated the principle that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.*, at 337. The tax schemes rejected by this Court in both *Maryland* v. *Louisiana* and *Boston Stock Exchange* involved transactional taxes rather than taxes on general income. That distinction, however, is irrelevant to our analysis. The franchise tax is a tax on the income of a business from its aggregated business transactions. It cannot be that a State can circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate—as is the franchise tax—rather than on individual transactions.

Nor is it relevant that New York discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical. New York allows a 70% credit against tax liability for all shipments made from within the State. This provision is

indistinguishable from one that would apply to New York shipments a tax rate that is 30% of that applied to shipments from other States.[10] We have declined to attach any constitutional significance to such formal distinctions that lack economic substance. See, *e. g.*, *Maryland* v. *Louisiana*, 451 U. S., at 756 (tax scheme imposing tax at uniform rate on in-state and out-of-state sales held to be unconstitutional because discrimination against interstate commerce was "the necessary result of various tax credits and exclusions" that benefited only in-state consumers of gas).

The Tax Commission contends that the DISC export credit is a subsidy to American export business generally, and as such, is consistent with congressional intent in establishing DISCs and with the Commerce Clause. We find no merit in this argument. While the Federal Government may seek to increase domestic employment and improve our balance-of-payments by offering tax advantages to those who produce in the United States rather than abroad, a State may not encourage the development of local industry by means of taxing measures that "invite a multiplication of preferential trade areas" within the United States, in contravention of the Commerce Clause. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951). We note, also, that if the credit were truly intended to promote exports from the United States in general, there would be no reason to limit it to exports from within New York.

The Tax Commission argues that even if the tax is discriminatory, the burden it places on interstate commerce is not of constitutional significance. It points to the facts that New York is a State with a relatively high franchise tax and that the actual effect of the credit, when viewed in terms of the whole New York tax scheme, is slight. It argues that

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[10] For example, Westinghouse was subject to a 9% tax rate in New York. On those shipments for which the 70% credit was allowed, the effective tax rate was 30% × 9%, or 2.7%.

the credit was not intended to divert new activity into New York, but, rather, to prevent the loss of economic activity already in the State at the time the tax on accumulated DISC income was enacted. Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that "forecloses tax-neutral decisions and . . . creates . . . an advantage" for firms operating in New York by placing "a discriminatory burden on commerce to its sister States." *Boston Stock Exchange*, 429 U. S., at 331.[11] The State has violated the prohibition in *Boston Stock Exchange* against using discriminatory state taxes to burden commerce in other States in an attempt to induce "'business operations to be performed in the home State that could more efficiently be performed elsewhere,'" *id.*, at 336, quoting *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145 (1970), and to "'impose an artificial rigidity on the economic pattern of the industry,'" *id.*, at 146, quoting *Toomer* v. *Witsell*, 334 U. S. 385, 404 (1948).[12] When a tax, on its face, is designed to have dis-

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[11] In an effort to rebut the argument that the credit diverts economic activity from other States, the Tax Commission also submits that New York's share of the Nation's export business has declined since the institution of the credit. Brief for Appellees 26–27. This loss of export business does not refute appellant's argument. Although the credit may not be large enough to halt or reverse the exodus of export business from New York, the discriminatory manner in which it is allowed no doubt has slowed the rate of decline in New York's share of national export shipping.

[12] The Tax Commission seeks to classify the tax credit at issue here as an indirect subsidy to export commerce, similar to provision and maintenance of ports, airports, waterways, and highways; to provision of police and fire protection; and to enactment of job-incentive credits and investment-tax credits. *Id.*, at 21–22. We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, *i. e.*, the percentage of a specific segment of the corporation's business that is conducted in New York. As in *Boston Stock Exchange*, we do not "hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a

criminatory economic effects, the Court "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland* v. *Louisiana*, 451 U. S., at 760.[13]

The manner in which New York allows corporations a tax credit on the accumulated income of their subsidiary DISCs discriminates against export shipping from other States, in violation of the Commerce Clause. The contrary judgment of the New York Court of Appeals is therefore reversed.

It is so ordered.

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free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." 429 U. S., at 336–337.

[13] In an attempt to illustrate the insignificance of the size and practical effect of the credit at issue, the Tax Commission reminds us that rejection of the credit will have little effect on Westinghouse's tax bill for 1972 and 1973. In fact, in the absence of the credit, Westinghouse will owe approximately $8,500 more to the State of New York. See n. 8, *supra;* Tr. of Oral Arg. 20. This amount appears insignificant when compared to Westinghouse's New York tax bill of approximately $1 million for the 1972–1973 period. See *ibid.* Although the extent of the discrimination does not affect our analysis, we note that the controversy here is hardly over a *de minimis* amount when considered from the perspective of the amount of credit Westinghouse forwent because its DISC shipped the majority of its goods from ports outside New York. Westinghouse received $8,500 in credit because only 5% of its DISC's exports were shipped from New York. A similarly situated corporation whose DISC had conducted 100% of its export shipping from New York would have received a credit of approximately $170,000.

HELICOPTEROS NACIONALES DE COLOMBIA, S. A. *v.* HALL ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS

No. 82–1127. Argued November 8, 1983—Decided April 24, 1984

Petitioner, a Colombian corporation, entered into a contract to provide helicopter transportation for a Peruvian consortium, the alter ego of a joint venture that had its headquarters in Houston, Tex., during the consortium's construction of a pipeline in Peru for a Peruvian state-owned oil company. Petitioner has no place of business in Texas and never has been licensed to do business there. Its only contacts with the State consisted of sending its chief executive officer to Houston to negotiate the contract with the consortium, accepting into its New York bank account checks drawn by the consortium on a Texas bank, purchasing helicopters, equipment, and training services from a Texas manufacturer, and sending personnel to that manufacturer's facilities for training. After a helicopter owned by petitioner crashed in Peru, resulting in the death of respondents' decedents—United States citizens who were employed by the consortium—respondents instituted wrongful-death actions in a Texas state court against the consortium, the Texas manufacturer, and petitioner. Denying petitioner's motion to dismiss the actions for lack of *in personam* jurisdiction over it, the trial court entered judgment against petitioner on a jury verdict in favor of respondents. The Texas Court of Civil Appeals reversed, holding that *in personam* jurisdiction over petitioner was lacking, but in turn was reversed by the Texas Supreme Court.

Held: Petitioner's contacts with Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment and hence to allow the Texas court to assert *in personam* jurisdiction over petitioner. The one trip to Houston by petitioner's chief executive officer for the purpose of negotiating the transportation services contract cannot be regarded as a contact of a "continuous and systematic" nature, and thus cannot support an assertion of general jurisdiction. Similarly, petitioner's acceptance of checks drawn on a Texas bank is of negligible significance for purposes of determining whether petitioner had sufficient contacts in Texas. Nor were petitioner's purchases of helicopters and equipment from the Texas manufacturer and the related training trips a sufficient basis for the Texas court's assertion of jurisdiction. *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516. Mere purchases, even if occurring at regular intervals, are not enough to warrant

a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to the purchases. And the fact that petitioner sent personnel to Texas for training in connection with the purchases did not enhance the nature of petitioner's contacts with Texas. Pp. 413–419.

638 S. W. 2d 870, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 419.

Thomas J. Whalen argued the cause for petitioner. With him on the briefs were *Austin P. Magner, Cynthia J. Larsen, James E. Ingram,* and *Barry A. Chasnoff.*

George E. Pletcher argued the cause and filed a brief for respondents.*

JUSTICE BLACKMUN delivered the opinion of the Court.

We granted certiorari in this case, 460 U. S. 1021 (1983), to decide whether the Supreme Court of Texas correctly ruled that the contacts of a foreign corporation with the State of Texas were sufficient to allow a Texas state court to assert jurisdiction over the corporation in a cause of action not arising out of or related to the corporation's activities within the State.

I

Petitioner Helicopteros Nacionales de Colombia, S. A. (Helicol), is a Colombian corporation with its principal place of business in the city of Bogota in that country. It is engaged in the business of providing helicopter transportation for oil and construction companies in South America. On

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**Robert L. Stern, Stephen M. Shapiro, William H. Crabtree,* and *Edward P. Good* filed a brief for the Motor Vehicle Manufacturers Association as *amicus curiae* urging reversal.

Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Kathryn A. Oberly, Michael F. Hertz, and *Howard S. Scher* filed a brief for the United States as *amicus curiae.*

January 26, 1976, a helicopter owned by Helicol crashed in Peru. Four United States citizens were among those who lost their lives in the accident. Respondents are the survivors and representatives of the four decedents.

At the time of the crash, respondents' decedents were employed by Consorcio, a Peruvian consortium, and were working on a pipeline in Peru. Consorcio is the alter ego of a joint venture named Williams-Sedco-Horn (WSH).[1] The venture had its headquarters in Houston, Tex. Consorcio had been formed to enable the venturers to enter into a contract with Petro Peru, the Peruvian state-owned oil company. Consorcio was to construct a pipeline for Petro Peru running from the interior of Peru westward to the Pacific Ocean. Peruvian law forbade construction of the pipeline by any non-Peruvian entity.

Consorcio/WSH[2] needed helicopters to move personnel, materials, and equipment into and out of the construction area. In 1974, upon request of Consorcio/WSH, the chief executive officer of Helicol, Francisco Restrepo, flew to the United States and conferred in Houston with representatives of the three joint venturers. At that meeting, there was a discussion of prices, availability, working conditions, fuel, supplies, and housing. Restrepo represented that Helicol could have the first helicopter on the job in 15 days. The Consorcio/WSH representatives decided to accept the contract proposed by Restrepo. Helicol began performing before the agreement was formally signed in Peru on November 11, 1974.[3] The contract was written in Spanish on

[1] The participants in the joint venture were Williams International Sudamericana, Ltd., a Delaware corporation; Sedco Construction Corporation, a Texas corporation; and Horn International, Inc., a Texas corporation.

[2] Throughout the record in this case the entity is referred to both as Consorcio and as WSH. We refer to it hereinafter as Consorcio/WSH.

[3] Respondents acknowledge that the contract was executed in Peru and not in the United States. Tr. of Oral Arg. 22–23. See App. 79a; Brief for Respondents 3.

official government stationery and provided that the residence of all the parties would be Lima, Peru. It further stated that controversies arising out of the contract would be submitted to the jurisdiction of Peruvian courts. In addition, it provided that Consorcio/WSH would make payments to Helicol's account with the Bank of America in New York City. App. 12a.

Aside from the negotiation session in Houston between Restrepo and the representatives of Consorcio/WSH, Helicol had other contacts with Texas. During the years 1970–1977, it purchased helicopters (approximately 80% of its fleet), spare parts, and accessories for more than $4 million from Bell Helicopter Company in Fort Worth. In that period, Helicol sent prospective pilots to Fort Worth for training and to ferry the aircraft to South America. It also sent management and maintenance personnel to visit Bell Helicopter in Fort Worth during the same period in order to receive "plant familiarization" and for technical consultation. Helicol received into its New York City and Panama City, Fla., bank accounts over $5 million in payments from Consorcio/WSH drawn upon First City National Bank of Houston.

Beyond the foregoing, there have been no other business contacts between Helicol and the State of Texas. Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no records in Texas and has no shareholders in that State.[4] None of the

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[4]The Colombian national airline, Aerovias Nacionales de Colombia, owns approximately 94% of Helicol's capital stock. The remainder is held

respondents or their decedents were domiciled in Texas, Tr. of Oral Arg. 17, 18,[5] but all of the decedents were hired in Houston by Consorcio/WSH to work on the Petro Peru pipeline project.

Respondents instituted wrongful-death actions in the District Court of Harris County, Tex., against Consorcio/WSH, Bell Helicopter Company, and Helicol. Helicol filed special appearances and moved to dismiss the actions for lack of *in personam* jurisdiction over it. The motion was denied. After a consolidated jury trial, judgment was entered against Helicol on a jury verdict of $1,141,200 in favor of respondents.[6] App. 174a.

The Texas Court of Civil Appeals, Houston, First District, reversed the judgment of the District Court, holding that *in personam* jurisdiction over Helicol was lacking. 616 S. W. 2d 247 (1981). The Supreme Court of Texas, with three justices dissenting, initially affirmed the judgment of the Court of Civil Appeals. App. to Pet. for Cert. 46a–62a. Seven months later, however, on motion for rehearing, the court withdrew its prior opinions and, again with three justices dissenting, reversed the judgment of the intermediate court. 638 S. W. 2d 870 (1982). In ruling that the Texas courts had

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by Aerovias Corporacion de Viajes and four South American individuals. See Brief for Petitioner 2, n. 2.

[5] Respondents' lack of residential or other contacts with Texas of itself does not defeat otherwise proper jurisdiction. *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 780 (1984); *Calder* v. *Jones*, 465 U. S. 783, 788 (1984). We mention respondents' lack of contacts merely to show that nothing in the nature of the relationship between respondents and Helicol could possibly enhance Helicol's contacts with Texas. The harm suffered by respondents did not occur in Texas. Nor is it alleged that any negligence on the part of Helicol took place in Texas.

[6] Defendants Consorcio/WSH and Bell Helicopter Company were granted directed verdicts with respect to respondents' claims against them. Bell Helicopter was granted a directed verdict on Helicol's cross-claim against it. App. 167a. Consorcio/WSH, as cross-plaintiff in a claim against Helicol, obtained a judgment in the amount of $70,000. *Id.*, at 174a.

in personam jurisdiction, the Texas Supreme Court first held that the State's long-arm statute reaches as far as the Due Process Clause of the Fourteenth Amendment permits. *Id.*, at 872.[7] Thus, the only question remaining for the court to decide was whether it was consistent with the Due Process Clause for Texas courts to assert *in personam* jurisdiction over Helicol. *Ibid.*

II

The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam*

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[7] The State's long-arm statute is Tex. Rev. Civ. Stat. Ann., Art. 2031b (Vernon 1964 and Supp. 1982–1983). It reads in relevant part:

"Sec. 3. Any foreign corporation . . . that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation . . . of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation . . . is a party or is to be made a party.

"Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation . . . shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State."

The last sentence of § 4 was added by 1979 Tex. Gen. Laws, ch. 245, § 1, and became effective August 27, 1979.

The Supreme Court of Texas in its principal opinion relied upon rulings in *U-Anchor Advertising, Inc.* v. *Burt*, 553 S. W. 2d 760 (Tex. 1977); *Hoppenfeld* v. *Crook*, 498 S. W. 2d 52 (Tex. Civ. App. 1973); and *O'Brien* v. *Lanpar Co.*, 399 S. W. 2d 340 (Tex. 1966). It is not within our province, of course, to determine whether the Texas Supreme Court correctly interpreted the State's long-arm statute. We therefore accept that court's holding that the limits of the Texas statute are coextensive with those of the Due Process Clause.

jurisdiction over a nonresident defendant. *Pennoyer* v. *Neff*, 95 U. S. 714 (1878). Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945), quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940). When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction. *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977).[8]

Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State,[9] due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952); see *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 779–780 (1984). In *Perkins*, the Court addressed a situation in which state courts had asserted general jurisdiction over a defendant foreign corporation. During the Japa-

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[8] It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. See Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144–1164 (1966).

[9] When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant. See Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 80–81; Von Mehren & Trautman, 79 Harv. L. Rev., at 1136–1144; *Calder* v. *Jones*, 465 U. S., at 786.

nese occupation of the Philippine Islands, the president and general manager of a Philippine mining corporation maintained an office in Ohio from which he conducted activities on behalf of the company. He kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines. In short, the foreign corporation, through its president, "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just." 342 U. S., at 438, 445.

All parties to the present case concede that respondents' claims against Helicol did not "arise out of," and are not related to, Helicol's activities within Texas.[10] We thus must

[10] See Brief for Respondents 14; Tr. of Oral Arg. 26–27, 30–31. Because the parties have not argued any relationship between the cause of action and Helicol's contacts with the State of Texas, we, contrary to the dissent's implication, *post*, at 419–420, assert no "view" with respect to that issue.

The dissent suggests that we have erred in drawing no distinction between controversies that "relate to" a defendant's contacts with a forum and those that "arise out of" such contacts. *Post*, at 420. This criticism is somewhat puzzling, for the dissent goes on to urge that, for purposes of determining the constitutional validity of an assertion of specific jurisdiction, there really should be no distinction between the two. *Post*, at 427–428.

We do not address the validity or consequences of such a distinction because the issue has not been presented in this case. Respondents have made no argument that their cause of action either arose out of or is related to Helicol's contacts with the State of Texas. Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the

explore the nature of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*. We hold that they do not.

It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.

The one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-services contract with Consorcio/WSH cannot be described or regarded as a contact of a "continuous and systematic" nature, as *Perkins* described it, see also *International Shoe Co.* v. *Washington*, 326 U. S., at 320, and thus cannot support an assertion of *in personam* jurisdiction over Helicol by a Texas court. Similarly, Helicol's acceptance from Consorcio/WSH of checks drawn on a Texas bank is of negligible significance for purposes of determining whether Helicol had sufficient contacts in Texas. There is no indication that Helicol ever requested that the checks be drawn on a Texas bank or that there was any negotiation between Helicol and Consorcio/WSH with respect to the location or identity of the bank on which checks would be drawn. Common sense and everyday experience suggest that, absent unusual circumstances,[11] the bank on which a check is drawn is generally of little

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question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

[11] For example, if the financial health and continued ability of the bank to honor the draft are questionable, the payee might request that the check be drawn on an account at some other institution.

consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction. See *Kulko* v. *California Superior Court*, 436 U. S. 84, 93 (1978) (arbitrary to subject one parent to suit in any State where other parent chooses to spend time while having custody of child pursuant to separation agreement); *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State"); see also Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 99 (1983).

The Texas Supreme Court focused on the purchases and the related training trips in finding contacts sufficient to support an assertion of jurisdiction. We do not agree with that assessment, for the Court's opinion in *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516 (1923) (Brandeis, J., for a unanimous tribunal), makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction.

The defendant in *Rosenberg* was a small retailer in Tulsa, Okla., who dealt in men's clothing and furnishings. It never had applied for a license to do business in New York, nor had it at any time authorized suit to be brought against it there. It never had an established place of business in New York and never regularly carried on business in that State. Its only connection with New York was that it purchased from New York wholesalers a large portion of the merchandise sold in its Tulsa store. The purchases sometimes were made by correspondence and sometimes through visits to New York by an officer of the defendant. The Court concluded: "Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of [New York]." *Id.*, at 518.

This Court in *International Shoe* acknowledged and did not repudiate its holding in *Rosenberg*. See 326 U. S., at 318. In accordance with *Rosenberg*, we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.[12] Nor can we conclude that the fact that Helicol sent personnel into Texas for training in connection with the purchase of helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas. The training was a part of the package of goods and services purchased by Helicol from Bell Helicopter. The brief presence of Helicol employees in Texas for the purpose of attending the training sessions is no more a significant contact than were the trips to New York made by the buyer for the retail store in *Rosenberg*. See also *Kulko* v. *California Superior Court*, 436 U. S., at 93 (basing California jurisdiction on 3-day and 1-day stopovers in that State "would make a mockery of" due process limitations on assertion of personal jurisdiction).

III

We hold that Helicol's contacts with the State of Texas were insufficient to satisfy the requirements of the Due Proc-

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[12] This Court in *International Shoe* cited *Rosenberg* for the proposition that "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it." 326 U. S., at 318. Arguably, therefore, *Rosenberg* also stands for the proposition that mere purchases are not a sufficient basis for either general or specific jurisdiction. Because the case before us is one in which there has been an assertion of general jurisdiction over a foreign defendant, we need not decide the continuing validity of *Rosenberg* with respect to an assertion of specific jurisdiction, *i. e.*, where the cause of action arises out of or relates to the purchases by the defendant in the forum State.

ess Clause of the Fourteenth Amendment.[13] Accordingly, we reverse the judgment of the Supreme Court of Texas.

It is so ordered.

JUSTICE BRENNAN, dissenting.

Decisions applying the Due Process Clause of the Fourteenth Amendment to determine whether a State may constitutionally assert *in personam* jurisdiction over a particular defendant for a particular cause of action most often turn on a weighing of facts. See, *e. g.*, *Kulko* v. *California Superior Court*, 436 U. S. 84, 92 (1978); *id.*, at 101–102 (BRENNAN, J., dissenting). To a large extent, today's decision follows the usual pattern. Based on essentially undisputed facts, the Court concludes that petitioner Helicol's contacts with the State of Texas were insufficient to allow the Texas state courts constitutionally to assert "general jurisdiction" over all claims filed against this foreign corporation. Although my independent weighing of the facts leads me to a different conclusion, see *infra*, at 423–424, the Court's holding on this issue is neither implausible nor unexpected.

What is troubling about the Court's opinion, however, are the implications that might be drawn from the way in which the Court approaches the constitutional issue it addresses. First, the Court limits its discussion to an assertion of general jurisdiction of the Texas courts because, in its view, the

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[13] As an alternative to traditional minimum-contacts analysis, respondents suggest that the Court hold that the State of Texas had personal jurisdiction over Helicol under a doctrine of "jurisdiction by necessity." See *Shaffer* v. *Heitner*, 433 U. S. 186, 211, n. 37 (1977). We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.

underlying cause of action does "not aris[e] out of or relat[e] to the corporation's activities within the State." *Ante*, at 409. Then, the Court relies on a 1923 decision in *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, without considering whether that case retains any validity after our more recent pronouncements concerning the permissible reach of a State's jurisdiction. By posing and deciding the question presented in this manner, I fear that the Court is saying more than it realizes about constitutional limitations on the potential reach of *in personam* jurisdiction. In particular, by relying on a precedent whose premises have long been discarded, and by refusing to consider any distinction between controversies that "relate to" a defendant's contacts with the forum and causes of action that "arise out of" such contacts, the Court may be placing severe limitations on the type and amount of contacts that will satisfy the constitutional minimum.

In contrast, I believe that the undisputed contacts in this case between petitioner Helicol and the State of Texas are sufficiently important, and sufficiently related to the underlying cause of action, to make it fair and reasonable for the State to assert personal jurisdiction over Helicol for the wrongful-death actions filed by the respondents. Given that Helicol has purposefully availed itself of the benefits and obligations of the forum, and given the direct relationship between the underlying cause of action and Helicol's contacts with the forum, maintenance of this suit in the Texas courts "does not offend [the] 'traditional notions of fair play and substantial justice,'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945) (quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)), that are the touchstone of jurisdictional analysis under the Due Process Clause. I therefore dissent.

I

The Court expressly limits its decision in this case to "an assertion of general jurisdiction over a foreign defendant."

Ante, at 418, n. 12. See *ante*, at 415, and n. 10. Having framed the question in this way, the Court is obliged to address our prior holdings in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952), and *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, *supra*. In *Perkins*, the Court considered a State's assertion of general jurisdiction over a foreign corporation that "ha[d] been carrying on . . . a continuous and systematic, but limited, part of its general business" in the forum. 342 U. S., at 438. Under the circumstances of that case, we held that such contacts were constitutionally sufficient "to make it reasonable and just to subject the corporation to the jurisdiction" of that State. *Id.*, at 445 (citing *International Shoe*, *supra*, at 317–320). Nothing in *Perkins* suggests, however, that such "continuous and systematic" contacts are a necessary minimum before a State may constitutionally assert general jurisdiction over a foreign corporation.

The Court therefore looks for guidance to our 1923 decision in *Rosenberg*, *supra*, which until today was of dubious validity given the subsequent expansion of personal jurisdiction that began with *International Shoe*, *supra*, in 1945. In *Rosenberg*, the Court held that a company's purchases within a State, even when combined with related trips to the State by company officials, would not allow the courts of that State to assert general jurisdiction over all claims against the nonresident corporate defendant making those purchases.[1]

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[1] The Court leaves open the question whether the decision in *Rosenberg* was intended to address any constitutional limits on an assertion of "specific jurisdiction." *Ante*, at 418, n. 12 (citing *International Shoe*, 326 U. S., at 318). If anything is clear from Justice Brandeis' opinion for the Court in *Rosenberg*, however, it is that the Court was concerned only with general jurisdiction over the corporate defendant. See 260 U. S., at 517 ("The sole question for decision is whether . . . defendant was doing business within the State of New York in such manner and to such extent as to warrant the inference that it was present there"); *id.*, at 518 (the corporation's contacts with the forum "would not warrant the inference that the corporation was present within the jurisdiction of the State"); *ante*, at 417. The

Reasoning by analogy, the Court in this case concludes that Helicol's contacts with the State of Texas are no more significant than the purchases made by the defendant in *Rosenberg*. The Court makes no attempt, however, to ascertain whether the narrow view of *in personam* jurisdiction adopted by the Court in *Rosenberg* comports with "the fundamental transformation of our national economy" that has occurred since 1923. *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222–223 (1957). See also *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292–293 (1980); *id.*, at 308–309 (BRENNAN, J., dissenting); *Hanson* v. *Denckla*, 357 U. S. 235, 250–251 (1958); *id.*, at 260 (Black, J., dissenting). This failure, in my view, is fatal to the Court's analysis.

The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.

This is neither a unique nor a novel idea. As the Court first noted in 1957:

> "[M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the

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Court's resuscitation of *Rosenberg*, therefore, should have no bearing upon any forum's assertion of jurisidiction over claims that arise out of or relate to a defendant's contacts with the State.

> same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee, supra,* at 222–223.

See also *World-Wide Volkswagen, supra,* at 293 (reaffirming that "[t]he historical developments noted in *McGee* . . . have only accelerated in the generation since that case was decided"); *Hanson* v. *Denckla, supra,* at 250–251.

Moreover, this "trend . . . toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents," *McGee, supra,* at 222, is entirely consistent with the "traditional notions of fair play and substantial justice," *International Shoe,* 326 U. S., at 316, that control our inquiry under the Due Process Clause. As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities.

As a foreign corporation that has actively and purposefully engaged in numerous and frequent commercial transactions in the State of Texas, Helicol clearly falls within the category of nonresident defendants that may be subject to that forum's general jurisdiction. Helicol not only purchased helicopters and other equipment in the State for many years, but also sent pilots and management personnel into Texas to be trained in the use of this equipment and to consult with the seller on technical matters.[2] Moreover, negotiations for the

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[2] Although the Court takes note of these contacts, it concludes that they did not "enhanc[e] the nature of Helicol's contacts with Texas [because the] training was a part of the package of goods and services purchased by Helicol." *Ante,* at 418. Presumably, the Court's statement simply recog-

contract under which Helicol provided transportation services to the joint venture that employed the respondents' decedents also took place in the State of Texas. Taken together, these contacts demonstrate that Helicol obtained numerous benefits from its transaction of business in Texas. In turn, it is eminently fair and reasonable to expect Helicol to face the obligations that attach to its participation in such commercial transactions. Accordingly, on the basis of continuous commercial contacts with the forum, I would conclude that the Due Process Clause allows the State of Texas to assert general jurisdiction over petitioner Helicol.

II

The Court also fails to distinguish the legal principles that controlled our prior decisions in *Perkins* and *Rosenberg*. In particular, the contacts between petitioner Helicol and the State of Texas, unlike the contacts between the defendant and the forum in each of those cases, are significantly related to the cause of action alleged in the original suit filed by the respondents. Accordingly, in my view, it is both fair and reasonable for the Texas courts to assert specific jurisidiction over Helicol in this case.

By asserting that the present case does not implicate the specific jurisdiction of the Texas courts, see *ante*, at 415, and nn. 10 and 12, the Court necessarily removes its decision

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nizes that participation in today's interdependent markets often necessitates the use of complicated purchase contracts that provide for numerous contacts between representatives of the buyer and seller, as well as training for related personnel. Ironically, however, while relying on these modern-day realities to denigrate the significance of Helicol's contacts with the forum, the Court refuses to acknowledge that these same realities require a concomitant expansion in a forum's jurisdictional reach. See *supra*, at 421–423. As a result, when deciding that the balance in this case must be struck against jurisdiction, the Court loses sight of the ultimate inquiry: whether it is fair and reasonable to subject a nonresident corporate defendant to the jurisdiction of a State when that defendant has purposefully availed itself of the benefits and obligations of that particular forum. Cf. *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958).

from the reality of the actual facts presented for our consideration.[3] Moreover, the Court refuses to consider any distinction between contacts that are "related to" the underlying cause of action and contacts that "give rise" to the underlying cause of action. In my view, however, there is a substantial difference between these two standards for asserting specific jurisdiction. Thus, although I agree that the respondents' cause of action did not formally "arise out of" specific activities initiated by Helicol in the State of Texas, I believe that the wrongful-death claim filed by the respondents is significantly related to the undisputed contacts between Helicol and the forum. On that basis, I would conclude that the Due Process Clause allows the Texas courts to assert specific jurisdiction over this particular action.

The wrongful-death actions filed by the respondents were premised on a fatal helicopter crash that occurred in Peru. Helicol was joined as a defendant in the lawsuits because it provided transportation services, including the particular helicopter and pilot involved in the crash, to the joint venture

[3] Nor do I agree with the Court that the respondents have conceded that their claims are not related to Helicol's activities within the State of Texas. Although parts of their written and oral arguments before the Court proceed on the assumption that no such relationship exists, other portions suggest just the opposite:

"If it is the concern of the Solicitor General [appearing for the United States as *amicus curiae*] that a holding for Respondents here will cause foreign companies to refrain from purchasing in the United States for fear of exposure to general jurisdiction on unrelated causes of action, such concern is not well founded.

"Respondents' cause is not dependent on a ruling that mere purchases in a state, together with incidental training for operating and maintaining the merchandise purchased can constitute the ties, contacts and relations necessary to justify jurisdiction over an unrelated cause of action. However, regular purchases and training coupled with other contacts, ties and relations may form the basis for jurisdiction." Brief for Respondents 13–14.

Thus, while the respondents' position before this Court is admittedly less than clear, I believe it is preferable to address the specific jurisdiction of the Texas courts because Helicol's contacts with Texas are in fact related to the underlying cause of action.

that employed the decedents. Specifically, the respondent Hall claimed in her original complaint that "Helicol is . . . legally responsible for its own negligence through its pilot employee." App. 6a. Viewed in light of these allegations, the contacts between Helicol and the State of Texas are directly and significantly related to the underlying claim filed by the respondents. The negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash. Moreover, the helicopter involved in the crash was purchased by Helicol in Texas, and the pilot whose negligence was alleged to have caused the crash was actually trained in Texas. See Tr. Of Oral Arg. 5, 22. This is simply not a case, therefore, in which a state court has asserted jurisdiction over a nonresident defendant on the basis of wholly unrelated contacts with the forum. Rather, the contacts between Helicol and the forum are directly related to the negligence that was alleged in the respondent Hall's original complaint.[4] Because Helicol should have expected to be amenable to suit in the Texas courts for claims directly related to these contacts, it is fair and reasonable to allow the assertion of jurisdiction in this case.

Despite this substantial relationship between the contacts and the cause of action, the Court declines to consider whether the courts of Texas may assert specific jurisdiction over this suit. Apparently, this simply reflects a narrow interpretation of the question presented for review. See *ante*, at 415–416, n. 10. It is nonetheless possible that the Court's opinion may be read to imply that the specific jurisdiction of the Texas courts is inapplicable because the cause of action

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[4]The jury specifically found that "the pilot failed to keep the helicopter under proper control," that "the helicopter was flown into a treetop fog condition, whereby the vision of the pilot was impaired," that "such flying was negligence," and that "such negligence . . . was a proximate cause of the crash." See App. 167a–168a. On the basis of these findings, Helicol was ordered to pay over $1 million in damages to the respondents.

did not formally "arise out of" the contacts between Helicol and the forum. In my view, however, such a rule would place unjustifiable limits on the bases under which Texas may assert its jurisdictional power.[5]

Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State. For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action "did not 'arise out of,' and [is] not related to," that training. See *ante*, at 415. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the Court would concede that the specific jurisdiction of the Texas courts was applicable.

Our interpretation of the Due Process Clause has never been so dependent upon the applicable substantive law or the State's formal pleading requirements. At least since *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), the principal focus when determining whether a forum may constitutionally assert jurisdiction over a nonresident defendant has been on fairness and reasonableness to the defendant. To this extent, a court's specific jurisdiction should be applicable whenever the cause of action arises out of *or* relates to the contacts between the defendant and the forum. It is em-

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[5] Compare Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144–1163 (1966), with Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 80–88. See also Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 100–101, and n. 66 (1983).

inently fair and reasonable, in my view, to subject a defendant to suit in a forum with which it has significant contacts directly related to the underlying cause of action. Because Helicol's contacts with the State of Texas meet this standard, I would affirm the judgment of the Supreme Court of Texas.

PALMORE *v.* SIDOTI

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

No. 82–1734. Argued February 22, 1984—Decided April 25, 1984

When petitioner and respondent, both Caucasians, were divorced in Florida, petitioner, the mother, was awarded custody of their 3-year-old daughter. The following year respondent sought custody of the child by filing a petition to modify the prior judgment because of changed conditions, namely, that petitioner was then cohabiting with a Negro, whom she later married. The Florida trial court awarded custody to respondent, concluding that the child's best interests would be served thereby. Without focusing directly on the parental qualifications of petitioner, her present husband, or respondent, the court reasoned that although respondent's resentment at petitioner's choice of a black partner was insufficient to deprive petitioner of custody, there would be a damaging impact on the child if she remained in a racially mixed household. The Florida District Court of Appeal affirmed.

Held: The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Pp. 431–434.

426 So. 2d 34, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Robert J. Shapiro argued the cause and filed a brief for petitioner.

John E. Hawtrey argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney General Cooper*, *Kathryn A. Oberly*, and *Brian K. Landsberg*; for the American Civil Liberties Union Foundation et al. by *Burt Neuborne*, *William D. Zabel*, *Marcia Robinson Lowry*, *Thomas I. Atkins*, *Ira G. Greenberg*, and *Samuel Rabinove*; for Leigh Earls et al. by *Jay L. Carlson*, *James P. Tuite*, *Roderic V. O. Boggs*, *James D. Weill*, *Justin J. Finger*, *Jeffrey*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

I

When petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May 1980 in Florida, the mother was awarded custody of their 3-year-old daughter.

In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

After hearing testimony from both parties and considering a court counselor's investigative report, the court noted that the father had made allegations about the child's care, but the court made no findings with respect to these allegations. On the contrary, the court made a finding that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." App. to Pet. for Cert. 24.

The court then addressed the recommendations of the court counselor, who had made an earlier report "in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. *Niles v. Niles*, 299 So. 2d 162." *Id.*, at 25. From this vague reference to that earlier case, the court turned to the present case and noted the counselor's recommendation for a change in custody because

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P. Sinensky, Leslie K. Shedlin, and *Marc D. Stern;* and for the Women's Legal Defense Fund et al. by *Sally Katzen, Lynn Bregman,* and *Nancy Polikoff.*

"[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice." Record 84 (emphasis added).

The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

> "The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.*" App. to Pet. for Cert. 26–27 (emphasis added).

The Second District Court of Appeal affirmed without opinion, 426 So. 2d 34 (1982), thus denying the Florida Supreme Court jurisdiction to review the case. See Fla. Const., Art. V, § 3(b)(3); *Jenkins* v. *State*, 385 So. 2d 1356 (Fla. 1980). We granted certiorari, 464 U. S. 913 (1983), and we reverse.

II

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the "father's evident resentment of the mother's choice of a black partner is not sufficient" to deprive her of custody, then turns to what it regarded as the damaging im-

pact on the child from remaining in a racially mixed household. App. to Pet. for Cert. 26. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." *Id.*, at 24. This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner's unfitness to continue the custody of her child.

The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed[1] discrimination based on race. See *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308, 310 (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272 (1979). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of their

[1] The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880).

legitimate purpose, *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). See *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967).

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. Fla. Stat. § 61.13(2)(b)(1) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.[2] The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." *Palmer* v. *Thompson*, 403 U. S. 217, 260–261 (1971) (WHITE, J., dissenting).

This is by no means the first time that acknowledged racial prejudice has been invoked to justify racial classifications. In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), for example,

[2] In light of our holding based on the Equal Protection Clause, we need not reach or resolve petitioner's claim based on the Fourteenth Amendment's Due Process Clause.

this Court invalidated a Kentucky law forbidding Negroes to buy homes in white neighborhoods.

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.*, at 81.

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.[3]

The judgment of the District Court of Appeal is reversed.

It is so ordered.

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[3] This conclusion finds support in other cases as well. For instance, in *Watson* v. *Memphis*, 373 U. S. 526 (1963), city officials claimed that desegregation of city parks had to proceed slowly to "prevent interracial disturbances, violence, riots, and community confusion and turmoil." *Id.*, at 535. The Court found such predictions no more than "personal speculations or vague disquietudes," *id.*, at 536, and held that "constitutional rights may not be denied simply because of hostility to their assertion or exercise," *id.*, at 535. In *Wright* v. *Georgia*, 373 U. S. 284 (1963), the Court reversed a Negro defendant's breach-of-peace conviction, holding that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." *Id.*, at 293.

Syllabus

ELLIS ET AL. *v.* BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1150. Argued January 9, 1984—Decided April 25, 1984

Section 2, Eleventh of the Railway Labor Act permits a union and an employer to require all employees in the relevant bargaining unit to join the union as a condition of continued employment. The collective-bargaining agreement between respondent national union and an airline required that all of the airline's clerical employees join the union or pay agency fees equal to members' dues. Petitioners, present or former clerical employees who objected to the use of their compelled dues or fees for specified union activities, filed separate suits (later consolidated) in Federal District Court against respondents—the national union, its board of adjustment, and three locals—who conceded that, as was held in *Machinists* v. *Street*, 367 U. S. 740, the statutory authorization of the union shop did not permit a union to spend an objecting employee's money for union political or ideological activities, and who had adopted a rebate program under which objecting employees were ultimately reimbursed for their shares of such expenditures. The parties disagreed about the adequacy of the rebate scheme, and about the legality of charging objecting employees with union expenses for (1) the national union's quadrennial Grand Lodge convention, (2) litigation not involving the negotiation of agreements or settlement of grievances, (3) union publications, (4) social activities, (5) death benefits for employees, and (6) general organizing efforts. Granting summary judgment for petitioners on the question of liability concerning the six expenses at issue, the court, after a trial on damages, held that the union's existing rebate program adequately protected employees' rights, and ordered refunds for the expenditures at issue. Affirming in part and reversing in part, the Court of Appeals upheld the union's rebate plan, but ruled that, because the six challenged activities ultimately benefited the union's collective-bargaining efforts, it could finance them with dues collected from objecting employees.

Held:

1. Petitioners' challenge to the rebate program is properly before the Court. Although the claim for an injunction against the program would appear to be moot because the union has been decertified as the bargain-

ing representative of the airline's clerical employees, petitioners' additional claim for money damages, which would be in the form of interest on money illegally held for a period of time, remains in the case. Pp. 441–443.

2. The union's pure rebate approach for refunding the portion of dues expended for improper purposes to which the employee objects is inadequate. Even if the union were to pay interest on the amount refunded, it would still obtain an involuntary loan for purposes to which the employee objected. Given the existence of acceptable alternatives, such as advance reduction of dues, a union cannot be allowed, on the ground of administrative convenience, to commit dissenters' funds to improper uses even temporarily. Pp. 443–444.

3. While petitioners' primary submission is that the use of their fees to finance the challenged activities violated the First Amendment, the initial inquiry is whether the statute permits the union to charge petitioners for any of the challenged expenditures. The purpose of § 2, Eleventh in authorizing the union shop was to make it possible to require all members of a bargaining unit to pay their fair share of the union's costs of performing the function of exclusive bargaining agent, thus eliminating "free rider" employees on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof. When employees object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Pp. 444–448.

4. With regard to the specific union expenses challenged here, under the applicable test petitioners must help defray the costs of the national union's conventions, at which the members elect officers, establish bargaining goals, and formulate overall union policy. Such conventions are essential to the union's discharge of its duties as bargaining agent. Petitioners may also be charged for union social activities, which, though not central to collective bargaining, are sufficiently related to it to be charged to all employees. The statute also allows the union to charge objecting employees for its monthly magazine insofar as it reports to them about those activities the union can charge them for doing, but not insofar as the magazine reports on activities for which the union cannot spend dissenters' funds. Section 2, Eleventh does not authorize charging objecting employees for the union's general organizing efforts, or for expenses of litigation that is not incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit. The question whether the statute authorizes compelled

participation in a death benefit program need not be ruled upon, because the union is no longer the exclusive bargaining agent and petitioners are no longer involved in the program. Even assuming that petitioners would have a right to an injunction against future collections for death benefits, they are not entitled to a refund of past contributions since they had enjoyed a form of insurance for which the union collected a premium. Pp. 448–455.

5. There is no First Amendment barrier with regard to the three challenged activities for which the statute allows the union to use petitioners' contributions. The significant interference with First Amendment rights resulting from allowing the union shop is justified by the governmental interest in industrial peace. Forced contributions for union social affairs do not increase the infringement of the employee's First Amendment rights. And while both union publications and conventions have direct communicative content, there is little additional infringement of First Amendment rights, and none that is not justified by the governmental interests behind the union shop itself. Pp. 455–457.

685 F. 2d 1065, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Parts I, II, III, IV, and V (except Subdivision 1) of which POWELL, J., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 457.

Michael E. Merrill argued the cause and filed briefs for petitioners.

Laurence Gold argued the cause for respondents. With him on the brief were *George Kaufmann* and *James Coppess*.*

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*Briefs of *amici curiae* urging reversal were filed for the Legal Foundation of America by *David Crump;* and for the Mid-Atlantic Legal Foundation et al. by *Myrna P. Field.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *J. Albert Woll* and *Marsha Berzon;* and for the National Education Association by *Robert H. Chanin.*

Briefs of *amici curiae* were filed for the State Bar of California by *Seth M. Hufstedler* and *Robert S. Thompson;* and for Eddie Keller et al. by *Ronald A. Zumbrun* and *Anthony T. Caso.*

JUSTICE WHITE delivered the opinion of the Court.

In 1951, Congress amended the Railway Labor Act (Act or RLA) to permit what it had previously prohibited—the union shop. Section 2, Eleventh of the Act permits a union and an employer to require all employees in the relevant bargaining unit to join the union as a condition of continued employment. 45 U. S. C. § 152, Eleventh.[1] In *Machinists* v. *Street*, 367 U. S. 740 (1961), the Court held that the Act does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate "free riders" and the resentment they provoked. *Id.*, at 768–769. The Court did not express a view as to "expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support

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[1] Section 2, Eleventh provides in relevant part:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership . . . ." 64 Stat. 1238, 45 U. S. C. § 152, Eleventh.

union political activities." *Id.*, at 769–770, and n. 18. Petitioners challenge just such expenditures.

I

In 1971, respondent Brotherhood of Railway, Airline and Steamship Clerks (union or BRAC) and Western Airlines implemented a previously negotiated agreement requiring that all Western's clerical employees join the union within 60 days of commencing employment. As the agreement has been interpreted, employees need not become formal members of the union, but must pay agency fees equal to members' dues. Petitioners are present or former clerical employees of Western who objected to the use of their compelled dues for specified union activities.[2] They do not contest the legality of the union shop as such, nor could they. See *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956). They do contend, however, that they can be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances with Western Airlines.[3] Respondents—the national union, its board of adjustment, and three locals—concede that the statutory authorization of the union shop does not permit the use of petitioners' con-

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[2] This case is the consolidation of two separate suits, one brought by present and former Western employees who did not join the union, *Ellis* v. *Railway Clerks*, the other a class action brought by employees who did, *Fails* v. *Railway Clerks*.

[3] Each class member sent the following letter to the union:

"As an employee of Western Airlines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory 'agency fee' I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective bargaining and specifically protest the support of Legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity which is not a direct cost of collective bargaining on my behalf. I demand an accounting and refund from the Brotherhood of Railway, Airline and Steamship Clerks of all fees exacted from me by the so-called 'agency fee.'" 3 App. 234–235.

tributions for union political or ideological activities, see *Machinists* v. *Street*, *supra*, and have adopted a rebate program covering such expenditures. The parties disagree about the adequacy of the rebate scheme, and about the legality of burdening objecting employees with six specific union expenses that fall between the extremes identified in *Hanson* and *Street:* the quadrennial Grand Lodge convention, litigation not involving the negotiation of agreements or settlement of grievances, union publications, social activities, death benefits for employees, and general organizing efforts.

The District Court for the Southern District of California granted summary judgment to petitioners on the question of liability. Relying entirely on *Street*, it found that the six expenses at issue here, among others, were all "non-collective bargaining activities" that could not be supported by dues collected from protesting employees.[4] After a trial on damages, the court concluded that with regard to political and ideological activities, the union's existing rebate program, under which objecting employees were ultimately reimbursed for their share of union expenditures on behalf of political and charitable causes, was a good-faith effort to comply with legal requirements and adequately protected employees' rights. Relying on exhibits presented by respondents, the court ordered refunds of approximately 40% of dues paid for the expenditures at issue here. It also required that protesting employees' annual dues thereafter be reduced by the amount spent on activities not chargeable to them during the prior year. The court seems to have envisioned that this scheme would supplant the already-existing rebate scheme, for it included political expenditures among those to be figured into the dues reduction.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 685 F. 2d 1065 (1982). It held that

[4]The court certified this ruling for interlocutory appeal under 28 U. S. C. § 1292(b). The Court of Appeals for the Ninth Circuit did not permit the appeal.

the union's rebate plan was adequate even though it allowed the union to collect the full amount of a protesting employee's dues, use part of the dues for objectionable purposes, and only pay the rebate a year later. It found suggestions in this Court's cases that such a method would be acceptable, and had itself approved the rebate approach in an earlier case. The opinion did not address the dues reduction scheme imposed by the District Court. *Id.*, at 1069–1070. Turning to the question of permissible expenditures, the Court of Appeals framed "the relevant inquiry [a]s whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. . . . [That is, whether it] can be seen to promote, support or maintain the union as an effective collective bargaining agent." *Id.*, at 1072, 1074–1075. The court found that each of the challenged activities strengthened the union as a whole and helped it to run more smoothly, thus making it better able to negotiate and administer agreements. Because the six activities ultimately benefited the union's collective-bargaining efforts, the union was free to finance them with dues collected from objecting employees. One judge dissented, arguing that these were all "institutional expenses" that objecting employees cannot be forced to pay. *Id.*, at 1075–1076.

Petitioners sought review of the Court of Appeals' ruling on permissible expenses and the adequacy of the rebate scheme. We granted certiorari. 460 U. S. 1080 (1983). We hold that the union's rebate scheme was inadequate and that the Court of Appeals erred in finding that the RLA authorizes a union to spend compelled dues for its general litigation and organizing efforts.

II

A

There is some question as to whether petitioners' challenge to the rebate program is properly before us. In 1980, within a month of the entry of the District Court's judgment, the

union was decertified as the bargaining representative of Western Airlines' clerical employees. Thus, none of the petitioners is presently represented by the union or required to pay dues to it. Petitioners' claim for an injunction against the rebate scheme would therefore appear to be moot. But petitioners also sought money damages,[5] and damages for an illegal rebate program would necessarily have been in the form of interest on money illegally held for a period of time. That claim for damages remains in the case. The amount at issue is undeniably minute. But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. *Powell* v. *McCormack*, 395 U. S. 486, 496–498 (1969).

Respondents argue that the Court of Appeals erred in addressing the validity of the union's rebate scheme because it had been supplanted by the District Court's order, from which the union had not appealed. They also contend that, for the same reason, the adequacy of the old system is "not justiciable" and "academic." Brief for Respondents 11, and n. 5. We disagree. The District Court specifically held that the rebate scheme vindicated the dissenting employees' rights with regard to political and ideological activities, and the Court of Appeals affirmed. The Court of Appeals also held that the expenditures the union had included in the rebate scheme were the only ones to which protesting employees could not be compelled to contribute, thereby eliminating the basis for the District Court's additional order that the union reduce dues prospectively. In any event, even though the District Court required a dues reduction scheme for the future, petitioners did not receive damages for the prior allegedly inadequate rebate program, precisely because

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[5] In their complaints, petitioners made a generalized claim for "monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights." 1 App. 13.

both lower courts upheld it. In these circumstances, the issue is properly before us.[6]

B

As the Court of Appeals pointed out, there is language in this Court's cases to support the validity of a rebate program. *Street* suggested "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." 367 U. S., at 775. See also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 238 (1977). On the other hand, we suggested a more precise advance reduction scheme in *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963), where we described a "practical decree" comprising a refund of exacted funds in the proportion that union political expenditures bore to total union expenditures and the reduction of future exactions by the same proportion. Those opinions did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies.[7] Doing so now, we hold that the pure rebate approach is inadequate.

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[6] Not before us is the adequacy of the dues reduction scheme imposed by the District Court. The issue is not among the questions presented by the petition for certiorari, the Court of Appeals did not address it, and the record does not reveal whether the scheme was ever implemented.

[7] The courts that have considered this question are divided. Compare *Robinson* v. *New Jersey*, 547 F. Supp. 1297 (NJ 1982); *School Committee* v. *Greenfield Education Assn.*, 385 Mass. 70, 431 N. E. 2d 180 (1982); *Robbinsdale Education Assn.* v. *Robbinsdale Federation of Teachers*, 307 Minn. 96, 239 N. W. 2d 437, vacated and remanded, 429 U. S. 880 (1976) (all holding or suggesting that such a scheme does not adequately protect the rights of dissenting employees), with *Seay* v. *McDonnell Douglas Corp.*, 533 F. 2d 1126, 1131 (CA9 1976); *Opinion of the Justices*, 401 A. 2d 135 (Me. 1979); *Association of Capitol Powerhouse Engineers* v. *Division of Bldg. & Grounds*, 89 Wash. 2d 177, 570 P. 2d 1042 (1977) (all upholding rebate programs). See generally *Perry* v. *Local 2569*, 708 F. 2d 1258, 1261–1262 (CA7 1983).

By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.

The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.

III

Petitioners' primary submission is that the use of their fees to finance the challenged activities violated the First Amendment. This argument assumes that the Act allows these allegedly unconstitutional exactions. When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty. *E. g.*, *Califano* v. *Yamasaki*, 442 U. S. 682, 692–693 (1979); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (concurring opinion); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). As the Court noted when faced with a similar claim in *Street*, "the restraints against unnecessary constitutional decisions counsel against" addressing petitioners' constitutional claims "unless we must conclude that Congress, in authorizing a union shop under § 2, Eleventh also meant that the labor organization receiving an employee's money should be free, despite that employee's objection, to

spend his money" for these activities. 367 U. S., at 749. We therefore first inquire whether the statute permits the union to charge petitioners for any of the challenged expenditures.

IV

Section 2, Eleventh contains only one explicit limitation to the scope of the union shop agreement: objecting employees may not be required to tender "fines and penalties" normally required of union members. 45 U. S. C. § 152, Eleventh.[8] If there were nothing else, an inference could be drawn from this limited exception that all other payments obtained from voluntary members can also be required of those whose membership is forced upon them. Indeed, several witnesses appearing before the congressional Committees objected to the absence of any explicit limitation on the scope or amount of fees and dues that could be compelled.[9] That Congress

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[8] Senator Hill, one of the bill's sponsors, explained on the Senate floor that "'assessments' is not to include 'fines and penalties.' Thus if an individual member is fined for some infraction of the union bylaws or constitution, the union cannot obtain his discharge under a union-shop agreement in the event that the member refuses or fails to pay the fine imposed." 96 Cong. Rec. 15736 (1950).

[9] Jacob Aronson, vice president of the New York Central Railroad, complained that "the proposal does not even limit the number, kind, or amount of dues, fees, and assessments that may be required by the particular union." Hearings on H. R. 7789 before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 121 (1950) (House Hearings). See also Hearings on S. 3295 before a Subcommittee of the Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess., 173–174 (1950) (Senate Hearings). Daniel Loomis, appearing for the Association of Western Railways, objected that "[w]ithout any limitation upon the right of the organizations to levy dues, fees, or assessments all employees could be made subject to unwarranted and unlimited deductions from their pay and would have no voice as to the kind or amount of such dues, fees, or assessments. Such funds as were thus raised could be used indiscriminately by the organizations and in many cases solely at the discretion of the officers of the organizations." House Hearings, at 160; see also Senate Hearings, at 316–317.

enacted the provision over these objections arguably indicates that it was willing to tolerate broad exactions from objecting employees.

Furthermore, Congress was well aware of the broad scope of traditional union activities. The hearing witnesses referred in general terms to the costs of "[a]ctivities of labor organizations resulting in the procurement of employee benefits," House Hearings, at 10 (testimony of George Harrison), and the "policies and activities of labor unions," *id.*, at 50 (testimony of George Weaver). Indeed, it was pointed out that not only was the "securing and maintaining of a collective bargaining agreement . . . an expensive undertaking . . . , there are many other programs of a union" that require the financial and moral support of the workers. *Id.*, at 275; Senate Hearings, at 236 (statement of Theodore Brown). In short, Congress was adequately informed about the broad scope of union activities aimed at benefiting union members, and, in light of the absence of express limitations in § 2, Eleventh it could be plausibly argued that Congress purported to authorize the collection from involuntary members of the same dues paid by regular members. This view, however, was squarely rejected in *Street*, over the dissents of three Justices, and the cases that followed it.

In *Street*, the Court observed that the purpose of § 2, Eleventh was to make it possible to require all members of a bargaining unit to pay their fair share of the costs of performing the function of exclusive bargaining agent. The union shop would eliminate "free riders," employees who obtained the benefit of the union's participation in the machinery of the Act without financially supporting the union. That purpose, the Court held, Congress intended to be achieved without "vesting the unions with unlimited power to spend exacted money." 367 U. S., at 768. Undoubtedly, the union could collect from all employees what it needed to defray the expenses entailed in negotiating and administering a collective agreement and in adjusting grievances and disputes. The

Court had so held in *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956). But the authority to impose dues and fees was restricted at least to the "extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes," 367 U. S., at 768, even though Congress was well aware that unions had historically expended funds in the support of political candidates and issues. Employees could be required to become "members" of the union, but those who objected could not be burdened with any part of the union's expenditures in support of political or ideological causes. The Court expressed no view on other union expenses not directly involved in negotiating and administering the contract and in settling grievances.

Railway Clerks v. *Allen*, 373 U. S. 113 (1963), reaffirmed the approach taken in *Street*, and described the union expenditures that could fairly be charged to all employees as those "germane to collective bargaining." *Id.*, at 121, 122. Still later, in *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), we found no constitutional barrier to an agency shop agreement between a municipality and a teachers' union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent. In neither *Allen* nor *Abood*, however, did the Court find it necessary further to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.

We remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof. Only a

union that is certified as the exclusive bargaining agent is authorized to negotiate a contract requiring all employees to become members of or to make contributions to the union. Until such a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union; and by the same token, any obligatory payments required by a contract authorized by § 2, Eleventh terminate if the union ceases to be the exclusive bargaining agent. Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

With these considerations in mind, we turn to the particular expenditures for which petitioners insist they may not be charged.

V

1. *Conventions.* Every four years, BRAC holds a national convention at which the members elect officers, establish bargaining goals and priorities, and formulate overall union policy. We have very little trouble in holding that petitioners must help defray the costs of these conventions. Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions such as those at issue here are normal events about

which Congress was thoroughly informed [10] and seem to us to be essential to the union's discharge of its duties as bargaining agent. As the Court of Appeals pointed out, convention "activities guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements." 685 F. 2d, at 1073. In fact, like all national unions, BRAC is required to hold either a referendum or a convention at least every five years for the election of officers. 29 U. S. C. §481(a). We cannot fault it for choosing to elect its officers at a convention rather than by referendum.

2. *Social Activities.* Approximately 0.7% of Grand Lodge expenditures go toward purchasing refreshments for union business meetings and occasional social activities. 685 F. 2d, at 1074. These activities are formally open to nonmember employees. Petitioners insist that these expenditures are entirely unrelated to the union's function as collective-bargaining representative and therefore could not be charged to them. While these affairs are not central to collective bargaining, they are sufficiently related to it to be charged to all employees. As the Court of Appeals noted, "[t]hese small expenditures are important to the union's members because they bring about harmonious working relationships,

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[10] For example, George Harrison, then president of BRAC, took conventions as his example when asked to explain the difference between dues and assessments: "It may be that they have an international union convention every 4 years and they have a convention expense assessment to cover the cost of holding those conventions. The fireman would pay that expense as an extra assessment over and above his dues, while in my union the dues would cover all of that, and we would make a distribution internally to the different funds." House Hearings, at 257–258. See also Senate Hearings, at 128 (testimony of Paul Monahan of the United Railroad Workers) (conventions are "an extremely costly proposition"; in order to give "our membership *and the people for whom we bargain* the best representation at the least possible cost" conventions are held biannually rather than annually) (emphasis added).

promote closer ties among employees, and create a more pleasant environment for union meetings." *Ibid.*

We cannot say that these *de minimis* expenses are beyond the scope of the Act. Like conventions, social activities at union meetings are a standard feature of union operations. In a revealing statement, Senator Thomas, Chairman of the Senate Subcommittee, made clear his disinclination to have Congress define precisely what normal, minor union expenses could be charged to objectors; he did not want the bill to say that "the unions . . . must not have any of the . . . kinds of little dues that they take up for giving a party, or something of that nature." Senate Hearings, at 173–174. There is no indication that other Members of Congress were any more inclined to scrutinize the minor incidental expenses incurred by the union in running its operations.

3. *Publications.* The Grand Lodge puts out a monthly magazine, the Railway Clerk/interchange, paid for out of the union treasury. The magazine's contents are varied and include articles about negotiations, contract demands, strikes, unemployment and health benefits, proposed or recently enacted legislation, general news, products the union is boycotting, and recreational and social activities. See 685 F. 2d, at 1074; District Court's Findings of Fact, 3 App. 236; Brief for Petitioners 22; Brief for Respondents 32, and n. 19. The Court of Appeals found that the magazine "is the union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights to employees represented by BRAC." 685 F. 2d, at 1074. Under the union's rebate policy, objecting employees are not charged for that portion of the magazine devoted to "political causes." App. Exhibits 436. The rebate is figured by calculating the number of lines that are devoted to political issues as a proportion of the total number of lines. Tr. of Oral Arg. 38.

The union must have a channel for communicating with the employees, including the objecting ones, about its activities.

Congress can be assumed to have known that union funds go toward union publications; it is an accepted and basic union activity. The costs of "worker education" were specifically mentioned during the hearings. House Hearings, at 275; Senate Hearings, at 236. The magazine is important to the union in carrying out its representational obligations and a reasonable way of reporting to its constituents.

Respondents' limitation on the publication costs charged objecting employees is an important one, however. If the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity.[11] By the same token, the Act surely allows it to charge objecting employees for reporting to them about those activities it can charge them for doing.

4. *Organizing.* The Court of Appeals found that organizing expenses could be charged to objecting employees because organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining table. Despite this attenuated connection with collective bargaining, we think such expenditures are outside Congress' authorization. Several considerations support this conclusion.

First, the notion that §2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history. To the contrary, BRAC's president expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of unions.[12] "Nor was any

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[11] Given our holding that objecting employees cannot be charged for union organizing or litigation, they cannot be charged for the expense of reporting those activities to the membership.

[12] When asked if the union shop would "strengthen your industry-wide bargaining as presently exists in the railroad industry," Harrison replied:

"I do not think it would affect the power of bargaining one way or the other . . . . If I get a majority of the employees to vote for my union as the bargaining agent, I have got as much economic power at that stage of development as I will ever have. The man that is going to scab—he will

claim seriously advanced that the union shop was necessary to hold or increase union membership." *Street*, 367 U. S., at 763, n. 13. Thus, organizational efforts were not what Congress aimed to enhance by authorizing the union shop.

Second, where a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented.[13] Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.

Third, the free-rider rationale does not extend this far. The image of the smug, self-satisfied nonmember, stirring up resentment by enjoying benefits earned through other employees' time and money, is completely out of place when it comes to the union's overall organizing efforts. If one accepts that what is good for the union is good for the employees, a proposition petitioners would strenuously deny, then it may be that employees will ultimately ride for free on the union's organizing efforts outside the bargaining unit. But the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Nonbargaining unit organizing is not directed at that employee.

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scab whether he is in or out of the union, and it does not make any difference." House Hearings, at 20–21.

[13] The District Court found that the organizing expenses here were spent in part to recruit new union members within the bargaining unit. This is because the collective-bargaining agreement involved in this case is administered as an agency shop rather than a union shop provision. By its terms, § 2, Eleventh authorizes negotiation of a union shop; it may be read to authorize negotiation of an agency shop. See *NLRB* v. *General Motors Corp.*, 373 U. S. 734 (1963) (interpreting the equivalent provision in the National Labor Relations Act). But it would be perverse to read it as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members.

Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any free-rider problem here is roughly comparable to that resulting from union contributions to pro-labor political candidates. As we observed in *Street*, that is a far cry from the free-rider problem with which Congress was concerned.

5. *Litigation.* The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees. Contrary to the view of the Court of Appeals, therefore, unless the Western Airlines bargaining unit is directly concerned, objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

6. *Death benefits.* BRAC pays from its general funds a $300 death benefit to the designated beneficiary of any member or nonmember required to pay dues to the union. In *Street*, the Court did not adjudicate the legality under § 2, Eleventh of compelled participation in a death benefit program, citing it as an example of an expenditure in the area between the costs which led directly to the complaint as to "free riders," and the expenditures to support union political activities. 367 U. S., at 769–770, and n. 18. In *Allen*, the

state trial court, like the District Court in this case, found that compelled payments to support BRAC's death benefit system were not reasonably necessary or related to collective bargaining and could not be charged to objecting employees. See 373 U. S., at 117. We found it unnecessary to reach the correctness of that conclusion.

Here, the Court of Appeals said that death benefits have historically played an important role in labor organizations, that insurance benefits are a mandatory subject of bargaining, and that by providing such benefits itself rather than seeking them from the employer, BRAC is in a better position to negotiate for additional benefits or higher wages. The court added that the "provision of a death benefits plan, which tends to strengthen the employee's ties to the union, is germane to the work of the union within the realm of collective bargaining." 685 F. 2d, at 1074. This was consistent with the affidavit of one of the union's expert witnesses to the effect that "death benefit funds do provide a desirable economic benefit to union members and, therefore, they do serve as an organizational aid and as a means of strengthening the union internally." Affidavit of Lloyd Ulman, 2 App. 210. Petitioners, of course, press the view that death benefits have no connection with collective bargaining at all, let alone one that would warrant forcing them to participate in the system.

We find it unnecessary to rule on this question. Because the union is no longer the exclusive bargaining agent and petitioners are no longer involved in the death benefits system, the only issue is whether petitioners are entitled to a refund of their past contributions. We think that they are not so entitled, even if they had the right to an injunction to prevent future collections from them for death benefits. Although they objected to the use of their funds to support the benefits plan, they remained entitled to the benefits of the plan as long as they paid their dues; they thus enjoyed a form of

insurance for which the union collected a premium.[14] We doubt that the equities call for a refund of those payments.

VI

Petitioners' primary argument is that for the union to compel their financial support of these six activities violates the First Amendment. We need only address this contention with regard to the three activities for which, we have held, the RLA allows the union to use their contributions. We perceive no constitutional barrier.

The First Amendment does limit the uses to which the union can put funds obtained from dissenting employees. See generally *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977). But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. "To be required to help finance the union as a collective-bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.*, at 222. It has long been settled that such interference with First Amendment

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[14] At oral argument, petitioners' counsel stated that at the time their complaints were filed, nonmembers were not in fact eligible for death benefits, even though their agency fees helped support the program. Tr. of Oral Arg. 9. In pretrial filings, petitioners relied on this as an example of the union's breach of its duty of fair representation. See 2 Record, Doc. No. 75, p. 40. The fair representation argument is not before us. Nor is it clear from the record whether petitioners are correct as a factual matter. See 3 Record, Doc. No. 155, p. 47, n. 23 (defendants' memorandum in opposition to summary judgment). We would have no hesitation in holding, however, that the union lacks authorization under the RLA to use nonmembers' fees for death benefits they cannot receive. Section 2, Eleventh is based on the presumption that nonmembers benefit equally with members from the uses to which union money is put.

rights is justified by the governmental interest in industrial peace. *Ibid.*; *Street*, 367 U. S., at 776, 778 (Douglas, J., concurring); *Hanson*, 351 U. S., at 238. At a minimum, the union may constitutionally "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." *Railway Clerks* v. *Allen*, 373 U. S., at 122. The issue is whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.

Petitioners do not explicitly contend that union social activities implicate serious First Amendment interests. We need not determine whether contributing money to such affairs is an act triggering First Amendment protection. To the extent it is, the communicative content is not inherent in the act, but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union. Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint.

The First Amendment concerns with regard to publications and conventions are more serious; both have direct communicative content and involve the expression of ideas. Nonetheless, we perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself. As the discussion of these expenses indicated, they "relat[e] to the work of the union in the realm of collective bargaining." *Hanson*, *supra*, at 235. The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds. "'The furtherance of the common cause leaves some leeway

for the leadership of the group.'" *Abood, supra,* at 221–222, quoting *Street, supra,* at 778 (Douglas, J., concurring). These expenses are well within the acceptable range.

VII

The Court of Appeals erred in holding that respondents were entitled to charge petitioners for their pro rata share of the union's organizing and litigating expenses, and that the former rebate scheme adequately protected the objecting employees from the misuse of their contributions. The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.[15]

It is so ordered.

JUSTICE POWELL, concurring in part and dissenting in part.

I am in accord with Parts I, II, III, and IV of the Court's opinion, and with all of Part V except for Subdivision 1, which addresses the "convention" issue. I also do not agree with the Court's analysis in Part VI in which petitioners' First Amendment arguments are disposed of summarily.

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[15] On remand, damages will have to recalculated. Petitioners argue that a new trial is required because the District Court applied a preponderance-of-the-evidence, rather than a clear-and-convincing, standard of proof. It is plain from the discussion of this issue in *Railway Clerks* v. *Allen,* 373 U. S. 113 (1963), in which we held that the union bears the burden of proving what proportion of expenditures went to activities that could be charged to dissenters, that no heightened standard is appropriate in this situation. We noted there that "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." *Id.,* at 122. The fact that petitioners invoke the First Amendment is insufficient reason to impose the heightened standard on their opponents, and we perceive no need to abandon the preponderance standard normally applicable in civil suits for damages. See generally *Addington* v. *Texas,* 441 U. S. 418, 423–425 (1979).

I

For the most part, the Court's opinion considers whether the Railway Labor Act itself permits the respondent union to charge nonunion employees for the challenged expenditures. The First Amendment, upon which petitioners primarily rely, is not the basis for the Court's decision except to the extent this was addressed in Part VI. In light of prior decisions construing the Act, I agree with the Court's decision to dispose of most of petitioners' claims on statutory rather than constitutional grounds.

The relevant general principles, as the Court has shown, are well settled. *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956); *Machinists* v. *Street*, 367 U. S. 740 (1961); *Railway Clerks* v. *Allen*, 373 U. S. 113 (1963). It is clear from these decisions that objecting nonunion employees may not properly be required to contribute to political causes with which they may disagree. No prior decision of this Court, however, has "define[d] the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ante*, at 447. The Court today adopts a statutory test or standard for identifying expenditures that fairly can be viewed as benefiting all employees:

> "[W]hen employees such as petitioners [in this case] object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ante*, at 448.

This standard fairly reflects statutory intent and is reasonable. But like any general standard, reasonable people—and judges—may differ as to its application to particular types of expenditures. In this case, petitioners challenge six general categories of expenditures incurred by respondent

union (BRAC): the quadrennial conventions, litigation not involving the negotiation of agreements or settlement of grievances, union publications, social activities, death benefits for employees, and general organizing activities. As noted above, I concur in the Court's disposition of all of these categories except the quadrennial conventions of BRAC.

The Court, in a single paragraph, concludes that in view of the primary purposes of a national convention, it is appropriate for petitioners to "help defray the costs of these conventions." *Ante*, at 448. I agree that conventions are necessary to elect officers, to determine union policy with respect to major issues of collective bargaining, and generally to enable the national union to perform its essential functions as the exclusive bargaining representative of employees. But it is not seriously questioned that conventions also afford opportunities—that often are fully exploited—to further political objectives of unions generally and of the particular union in convention.

The District Court's findings in this case were based on the record with respect to the 25th quadrennial convention of BRAC. Its cost to the union was approximately $1,802,000. The minutes of the convention indicate that a number of major addresses were made by prominent politicians, including Senators Humphrey, Kennedy, Hartke, and Schweiker, the Mayor of Washington, D. C., and four Congressmen. The union has not shown how this major participation of politicians contributed even remotely to collective bargaining. Before a union may compel dissenting employees to defray the cost of union expenses, it must meet its burden of showing that those expenses were "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [collective-bargaining] representative." *Ante*, at 448. See *Railway Clerks* v. *Allen*, 373 U. S., at 122.[1] Appar-

[1] Respondents' brief emphasizes the purposes and activities of these quadrennial conventions that do relate—even though sometimes tangentially—to collective bargaining. Respondents' brief deals only lightly with political speeches and activities. It does say that the "appearances of the

ently no effort was made by the union in this case to identify expenses fairly attributable to these and other political activities, and to make appropriate deductions from the dues of objecting employees. I do not suggest that such an allocation can be made with mathematical exactitude. But reasonable estimates surely could have been made. See *ibid.* The union properly felt a responsibility to allocate expenses where political material was carried in union publications. See *ante*, at 450–451.

In view of the foregoing, I do not understand how the Court can make the judgment today that all the expenses of the 25th quadrennial meeting of BRAC qualify under the Court's new standard as "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [collective-bargaining] representative." I, therefore, would reverse the Court of Appeals on this issue, and remand the case for further consideration in light of the standard articulated by the Court.

II

In Part VI the Court found it necessary to address petitioners' First Amendment argument with respect to three of the six activities at issue: social affairs, publications, and con-

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Mayor of Washington and the other public officials created no additional costs to BRAC," and "if there had been such costs [such as paying honoraria] those costs would have been deducted from [the dues of] objecting employees." Brief for Respondents 29, n. 16. This brief explanation leaves a number of unanswered questions. For example, the record does not appear to reveal who defrayed the travel, hotel, and other expenses of speakers and their staff who made political speeches or whose purpose in attending was to further political causes. Nor does the record show who paid for the considerable entertaining that likely was provided for speakers as distinguished as those mentioned above. This may or may not fairly be considered an appropriate expense under the Court's standard. In short, at least for me, it does not seem appropriate for this Court—on the record before us—to assume that *all* union activities were disassociated from political causes. The case should be remanded for a full development of these facts.

ventions. The reasoning of the Court is not clear to me. It agrees, as it must, that the First Amendment "does limit the uses to which the union can put funds obtained from dissenting employees," *ante*, at 455 (citing *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977)). Nevertheless, the Court's conclusion with respect to convention expenses appears to ignore that constraint.

In Part I above, I have expressed my disagreement with the Court's apparent determination that the Railway Labor Act permits the use of compulsory dues to help defray the costs of political activities incurred at the quadrennial conventions. Under that interpretation of the Act, it would be unnecessary to reach the constitutional question in this case. Even if Congress had intended the Act to permit such use of compulsory dues, it is clear that the First Amendment would not. Where funds are used to further political causes with which nonmembers may disagree, the decisions of this Court are explicit that nonmember employees may not be compelled to bear such expenditures. The Court's conclusory disposition of petitioners' argument ignores the force of these decisions. See *Abood*, *supra*, at 234; *Street*, 367 U. S., at 777–778 (Douglas, J., concurring).[2]

These same concerns would prohibit the union, as a constitutional matter, from charging dissenting employees for publication expenses related to political causes. Because the Court has determined that the Act prohibits the union from charging dissenting employees for publication expenses unrelated to collective bargaining, *ante*, at 451, I assume that the First Amendment discussion in Part VI applies only to publication expenses directly related to collective bargaining.

[2] In *Abood*, the Court observed:

"[The dissenting employees] specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one." 431 U. S., at 234.

Thus, I concur in Part VI of the Court's opinion only to the extent it holds that the First Amendment does not bar those publication expenses "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [collective-bargaining] representative."[3]

III

For the reasons stated above, I join Parts I, II, III, IV, and all but Subdivision 1 of Part V. As to the convention issue addressed in that subdivision, I believe that the judgment should be reversed and the case remanded to the Court of Appeals for further consideration in light of the test articulated today by the Court. In view of my position on that issue, I do not think it necessary to reach the First Amendment issue as to conventions; nor do I agree with the Court's summary conclusion that no First Amendment rights are implicated by the expenditure of funds on political causes at conventions. I, therefore, dissent from the Court's decision in Part V, Subdivision 1, and from its decision with respect to conventions found in Part VI. I concur in the remainder of the result reached in Part VI.

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[3] With respect to "social activities," I concur only in the result reached by the Court's First Amendment analysis. As the Court points out, the expenditures on such activities are "*de minimis*," and petitioners do not contend that the social activities here "implicate serious First Amendment interests." *Ante*, at 456. Within reasonable limits, I think it fairly may be argued that social occasions are related to the duties of the union as the exclusive representative of all of the employees in the bargaining unit. The fraternal aspect of a union may be relevant to its bargaining capability, and this Court has held that the First Amendment permits the union to "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963).

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* ITT WORLD COMMUNICATIONS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83–371. Argued March 21, 1984—Decided April 30, 1984

The Government in the Sunshine Act, 5 U. S. C. § 552b(b), requires that "meetings" of a federal agency be open to the public. Section 552b(a)(2) defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." Members of petitioner Federal Communications Commission (FCC) participate with their European and Canadian counterparts in the Consultative Process, a series of conferences intended to facilitate joint planning of telecommunications facilities through exchange of information or regulatory policies. In this case, three FCC members who constituted a quorum of the FCC's Telecommunications Committee, a subdivision of the FCC, attended such conferences at which they were to attempt to persuade the European nations to cooperate with the FCC in encouraging competition in the overseas telecommunications market. Respondents, who at the time, along with another corporation, were the only American corporations that provided overseas record telecommunications and who opposed the entry of new competitors, filed a rulemaking petition with the FCC requesting it to disclaim any intent to negotiate with foreign governments or to bind it to agreements at the conferences. Respondents alleged that such negotiations were ultra vires the FCC's authority and that, moreover, the Sunshine Act required the Consultative Process to be held in public. The FCC denied the petition. Respondent ITT World Communications, Inc., then filed suit in Federal District Court, similarly alleging that the FCC's negotiations with foreign officials at the Consultative Process were ultra vires the agency's authority and that future meetings of the Consultative Process must conform to the Sunshine Act's requirements. The District Court dismissed the ultra vires count on jurisdictional grounds but ordered the FCC to comply with the Sunshine Act. Considering on consolidated appeal the District Court's judgment and the FCC's denial of the rulemaking petition, the Court of Appeals affirmed the District Court's ruling that the Sunshine Act applied to meetings of the Consultative Process, but reversed the District Court's dismissal of the ultra vires count, and further held that the FCC had erroneously denied the rulemaking petition.

Held:

1. The District Court lacked jurisdiction over respondent's ultra vires claim. Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies by statute in the Court of Appeals. Litigants may not evade this requirement by requesting the District Court to enjoin action that is the outcome of the agency's order. Yet that is what respondents sought to do, since, in substance, the complaint in the District Court raised the same issues and sought to enforce the same restrictions upon FCC conduct as did the rulemaking petition that was denied by the FCC. Pp. 468–469.

2. The Sunshine Act does not require that Consultative Process sessions be held in public. Pp. 469–474.

(a) Such sessions do not constitute a "meeting" as defined by § 552b(a)(2). The Sunshine Act does not extend to deliberations of a quorum of a subdivision upon matters not within the subdivision's formally delegated authority. Such deliberations lawfully could not "determine or result in the joint conduct or disposition of official agency business" within the meaning of the Act. Here, the Telecommunications Committee at the Consultative Process session did not consider or act upon applications for common carrier certification, its only formally delegated authority. Pp. 469–473.

(b) Nor were the sessions in question a meeting "of an agency" within the meaning of the Sunshine Act. The Consultative Process was not convened by the FCC, and its procedures were not subject to the FCC's unilateral control. Pp. 473–474.

226 U. S. App. D. C. 67, 699 F. 2d 1219, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Albert J. Lauber, Jr., argued the cause for petitioners. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman, Frank A. Rosenfeld, Bruce E. Fein, Daniel M. Armstrong*, and *C. Grey Pash, Jr.*

Grant S. Lewis argued the cause for respondents. With him on the brief were *John S. Kinzey, Charles C. Platt, Howard A. White*, and *Susan I. Littman.*

JUSTICE POWELL delivered the opinion of the Court.

The Government in the Sunshine Act, 5 U. S. C. § 552b, mandates that federal agencies hold their meetings in public.

This case requires us to consider whether the Act applies to informal international conferences attended by members of the Federal Communications Commission. We also must decide whether the District Court may exercise jurisdiction over a suit that challenges agency conduct as ultra vires after the agency has addressed that challenge in an order reviewable only by the Court of Appeals.

I

Members of petitioner Federal Communications Commission (FCC) participate with their European and Canadian counterparts in what is referred to as the Consultative Process. This is a series of conferences intended to facilitate joint planning of telecommunications facilities through an exchange of information on regulatory policies. At the time of the conferences at issue in the present case, only three American corporations—respondents ITT World Communications, Inc. (ITT), and RCA Global Communications, Inc., and Western Union International—provided overseas record telecommunications services. Although the FCC had approved entry into the market by other competitors, European regulators had been reluctant to do so. The FCC therefore added the topic of new carriers and services to the agenda of the Consultative Process, in the hope that exchange of information might persuade the European nations to cooperate with the FCC's policy of encouraging competition in the provision of telecommunications services.

Respondents, opposing the entry of new competitors, initiated this litigation. First, respondents filed a rulemaking petition with the FCC concerning the Consultative Process meetings. The petition requested that the FCC disclaim any intent to negotiate with foreign governments or to bind it to agreements at the meetings, arguing that such negotiations were ultra vires the agency's authority. Further, the petition contended that the Sunshine Act required the Consultative Process sessions, as "meetings" of the FCC, to be

held in public. See 5 U. S. C. § 552b(b).[1] The FCC denied the rulemaking petition, and respondents filed an appeal in the Court of Appeals for the District of Columbia Circuit.

Respondent ITT then filed suit in the District Court for the District of Columbia. The complaint, like respondents' rulemaking petition, contended (i) that the agency's negotiations with foreign officials at the Consultative Process were ultra vires the agency's authority and (ii) that future meetings of the Consultative Process must conform to the requirements of the Sunshine Act. The District Court dismissed the ultra vires count on jurisdictional grounds, but ordered the FCC to comply with the Sunshine Act.[2] Respondent ITT appealed, and the Commission cross-appealed.

The Court of Appeals for the District of Columbia Circuit considered on consolidated appeal the District Court's judgment and the FCC's denial of the rulemaking petition. The District Court judgment was affirmed in part and reversed in part. 226 U. S. App. D. C. 67, 699 F. 2d 1219 (1983). The Court of Appeals affirmed the District Court's ruling that the Sunshine Act applied to meetings of the Consultative Process. It reversed the District Court's dismissal of the ultra

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[1] Section 552b(b) provides:

"Members [of a federal agency] shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation."

Subsection (c) contains exceptions, that are not relevant to the present case. Section 552b(a)(2) defines "meeting" as

"the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."

Section 552b(a)(1) defines the term "agency" to include "any agency . . . headed by a collegial body composed of two or more individual members . . . and any subdivision thereof authorized to act on behalf of the agency."

[2] The District Court had jurisdiction over the Sunshine Act claim under 5 U. S. C. § 552b(h)(1).

vires count, however. Noting that exclusive jurisdiction for review of final agency action lay in the Court of Appeals, that court held that the District Court nonetheless could entertain under 5 U. S. C. § 703[3] a suit that alleged that FCC participation in the Consultative Process should be enjoined as ultra vires the agency's authority. The case was remanded for consideration of the merits of respondents' ultra vires claim.

The Court of Appeals also concluded that the FCC erroneously had denied respondents' rulemaking petition. Consistent with its affirmance of the District Court, the Court of Appeals held that the FCC had erred in concluding that the Sunshine Act did not apply to the Consultative Process sessions. Further, the court found the record "patently inadequate" to support the FCC's conclusion that attendance at sessions of the Consultative Process was within the scope of its authority. 226 U. S. App. D. C., at 95, 699 F. 2d, at 1247. Although remanding to the FCC, the court suggested that the agency stay consideration of the rulemaking petition, as the District Court's action upon respondents' complaint might moot the question of rulemaking.

We granted certiorari, to decide whether the District Court could exercise jurisdiction over the ultra vires claim and whether the Sunshine Act applies to sessions of the Consultative Process.[4] 464 U. S. 932 (1983). We reverse.

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[3] Title 5 U. S. C. § 703 provides in part:

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction."

The Court of Appeals accepted respondents' contention that review in the Court of Appeals was inadequate to vindicate respondents' claims. See *infra*, at 469.

[4] The finding of the Court of Appeals that the administrative record was inadequate to support the FCC's denial of a petition for rulemaking on the issue of the scope of the FCC's authority to negotiate is not before the Court.

II

We consider initially the jurisdiction of the District Court to enjoin FCC action as ultra vires. Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals. 28 U. S. C. § 2342(1); 47 U. S. C. § 402(a). Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order. See *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 69 (1970); *Whitney National Bank* v. *Bank of New Orleans*, 379 U. S. 411, 419–422 (1965). Yet that is what respondents have sought to do in this case. In substance, the complaint filed in the District Court raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied by the FCC. See *supra*, at 465–466.[5] The appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute.

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[5] ITT urges that the ultra vires claim, unlike the petition for rulemaking, focuses on past rather than future agency conduct. It is true that the complaint in the District Court sought, in addition to prospective relief, a declaration that the Commission had violated the Administrative Procedure Act. See App. 71. But the gravamen of both the judicial complaint and the petition for rulemaking was to require the agency to conduct future sessions on the terms that ITT proposed. Indeed, it seems questionable whether a complaint that sought only a declaration that past conduct was unlawful would present to the District Court a case or controversy over which it could exercise subject-matter jurisdiction. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). In any event, even if the question of the lawfulness of the agency's past conduct were the central element of respondent ITT's judicial complaint, the District Court under the doctrine of primary jurisdiction should have dismissed the complaint, as respondents could have challenged the agency's past conduct by motion before the agency for a declaratory ruling, 47 CFR § 1.2 (1983). See *Whitney National Bank* v. *Bank of New Orleans*, 379 U. S. 411, 421, 426 (1965); *Far East Conference* v. *United States*, 342 U. S. 570, 574, 577 (1952).

The Administrative Procedure Act authorizes an action for review of final agency action in the District Court to the extent that other statutory procedures for review are inadequate. 5 U. S. C. §§ 703, 704. Respondents contend that these provisions confer jurisdiction in the present suit because the record developed upon consideration of the rulemaking petition by the agency does not enable the Court of Appeals fairly to evaluate their ultra vires claim. If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, see *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 593–594 (1980), or in some circumstances refer the case to a special master, see 28 U. S. C. § 2347(b)(3). Indeed, in the present case, the Court of Appeals has remanded the case to the agency for further proceedings. We conclude that the District Court lacked jurisdiction over respondents' ultra vires claim.

III

The Sunshine Act, 5 U. S. C. § 552b(b), requires that "meetings of an agency" be open to the public. Section 552b(a)(2) defines "meetings" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." Under these provisions, the Sunshine Act does not require that Consultative Process sessions be held in public, as the participation by FCC members in these sessions constitutes neither a "meeting" as defined by § 552b(a)(2) nor a meeting "of the agency" as provided by § 552b(b).

A

Congress in drafting the Act's definition of "meeting" recognized that the administrative process cannot be conducted entirely in the public eye. "[I]nformal background discussions [that] clarify issues and expose varying views" are a necessary part of an agency's work. See S. Rep. No. 94–

354, p. 19 (1975). The Act's procedural requirements[6] effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit.[7] Section 552b(a)(2) therefore limits the Act's application to meetings "where at least a quorum of the agency's members . . . conduct or dispose of official agency business." S. Rep. No. 94–354, at 2.

Three Commissioners, the number who attended the Consultative Process sessions, did not constitute a quorum of the seven-member Commission.[8] The three members were, however, a quorum of the Telecommunications Committee. That Committee is a "subdivision . . . authorized to act on behalf of the agency." The Commission had delegated to the

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[6] Meetings within the scope of the Act must be held in public unless one of the Act's exemptions is applicable. § 552b(b). The agency must announce, at least a week before the meeting, its time, place, and subject matter and whether it will be open or closed. § 552b(e)(1). For closed meetings, the agency's counsel must publicly certify that one of the Act's exemptions permits closure. § 552b(f)(1). Most closed meetings must be transcribed or recorded. *Ibid.*

[7] The evolution of the statutory language reflects the congressional intent precisely to define the limited scope of the statute's requirements. See generally H. R. Rep. No. 94–880, pt. 2, p. 14 (1976). For example, the Senate substituted the term "deliberations" for the previously proposed terms—"assembly or simultaneous communication," H. R. 11656, 94th Cong., 2d Sess., § 552b(a)(2) (1976), or "gathering," S. 5, 94th Cong., 1st Sess., § 201(a) (1975)—in order to "exclude many discussions which are informal in nature." S. Rep. No. 94–354, p. 10 (1975); see *id.*, at 18. Similarly, earlier versions of the Act had applied to any agency discussions that "concer[n] the joint conduct or disposition of agency business," H. R. 11656, *supra*, § 552b(a)(2). The Act now applies only to deliberations that "*determine or result in*" the conduct of "*official* agency business." The intent of the revision clearly was to permit preliminary discussion among agency members. See 122 Cong. Rec. 28474 (1976) (remarks of Rep. Fascell).

[8] Since the Consultative Process sessions at issue here, held in October 1979, the Commission's membership has been reduced to five. Pub. L. 97–253, § 501(b), 96 Stat. 805 (effective July 1, 1983).

Committee, pursuant to § 5(d)(1) of the Communications Act of 1934, 48 Stat. 1068, as amended, 47 U. S. C. § 155(d)(1), the power to approve applications for common carrier certification.[9] See 47 CFR § 0.215 (1983). The Sunshine Act applies to such a subdivision as well as to an entire agency. § 552b(a)(1).

It does not appear, however, that the Telecommunications Committee engaged at these sessions in "deliberations [that] determine or result in the joint conduct or disposition of official agency business." This statutory language contemplates discussions that "effectively predetermine official actions." See S. Rep. No. 94–354, at 19; accord, *id.*, at 18. Such discussions must be "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978) (hereinafter Interpretive Guide).[10] On the cross-motions for summary judgment, however, respondent ITT alleged neither that the Committee formally acted upon applications for certification at the Consultative Process sessions nor that those sessions resulted in firm positions on particular matters pending or likely to arise before the Committee.[11] Rather, the sessions

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[9] Common carriers "in interstate or foreign communication by wire or radio" or "radio transmission of energy," 47 U. S. C. § 153(h), must obtain from the Commission a certificate of public convenience or necessity before undertaking construction or operation of additional communications lines. 47 U. S. C. § 214. Permits must be obtained also for construction of radio broadcasting stations. 47 U. S. C. § 319.

[10] The Office of the Chairman of the Administrative Conference of the United States prepared the Interpretive Guide at Congress' request, § 552b(g), and after extensive consultation with the affected agencies. See Interpretive Guide, at v.

[11] Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss or for Summary Judg-

provided general background information to the Commissioners and permitted them to engage with their foreign counterparts in an exchange of views by which decisions already reached by the Commission could be implemented. As we have noted, Congress did not intend the Sunshine Act to encompass such discussions.

The Court of Appeals did not reach a contrary result by finding that the Commissioners were deliberating upon matters within their formally delegated authority. Rather, that court inferred from the members' attendance at the sessions an undisclosed authority, not formally delegated, to engage in discussions on behalf of the Commission. The court then concluded that these discussions were deliberations that resulted in the conduct of official agency business, as the discussions "play[ed] an integral role in the Commission's policymaking processes." 226 U. S. App. D. C., at 89, 699 F. 2d, at 1241.

We view the Act differently. It applies only where a subdivision of the agency deliberates upon matters that are within that subdivision's formally delegated authority to take official action for the agency. Under the reasoning of the Court of Appeals, any group of members who exchange views or gathered information on agency business apparently could be viewed as a "subdivision . . . authorized to act on behalf of the agency." The term "subdivision" itself indicates agency members who have been authorized to exercise formally delegated authority. See Interpretive Guide, at 2–3. Moreover, the more expansive view of the term "subdivision" adopted by the Court of Appeals would require public attendance at a host of informal conversations of the type Congress understood to be necessary for the effective conduct of

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ment 6–11, 46–50, and Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment 23–27, in Civ. No. 80–0428 (Dist. Ct. DC).

agency business.[12] In any event, it is clear that the Sunshine Act does not extend to deliberations of a quorum of the subdivision upon matters not within the subdivision's formally delegated authority. Such deliberations lawfully could not "determine or result in the joint conduct or disposition of official agency business" within the meaning of the Act.[13] As the Telecommunications Committee at the Consultative Process sessions did not consider or act upon applications for common carrier certification—its only formally delegated authority—we conclude that the sessions were not "meetings" within the meaning of the Sunshine Act.

B

The Consultative Process was not convened by the FCC, and its procedures were not subject to the FCC's unilateral control. The sessions of the Consultative Process therefore are not meetings "of an agency" within the meaning of § 552b(b). The Act prescribes procedures for the agency to follow when it holds meetings and particularly when it chooses to close a meeting. See n. 6, *supra*. These provisions presuppose that the Act applies only to meetings that the agency has the power to conduct according to these procedures. And application of the Act to meetings not under agency control would restrict the types of meetings that agency members could attend. It is apparent that Congress, in enacting requirements for the agency's conduct of its own meetings, did not contemplate as well such a broad sub-

[12] This point is made by the memorandum *amicus curiae* submitted to the Court by the American Bar Association: "The . . . decision [of the Court of Appeals] places . . . agencies in an untenable position. [U]nder the court's decision, [agency] members may not meet with persons from outside the agency to discuss any matter within the official concern of the agency without complying with the provisions of the Sunshine Act. Such a result would have a pronounced (and deleterious) effect on the interaction between the agencies and the public . . . ." Memorandum, at 5–6.

[13] Ultra vires action by a subdivision would be of no legal effect.

stantive restraint upon agency processes. See S. Rep. No. 94–354, at 1.

IV

For these reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES v. RODGERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-620. Argued March 27, 1984—Decided April 30, 1984

Respondent was indicted for making false statements to the Federal Bureau of Investigation (FBI) and the United States Secret Service, in violation of 18 U. S. C. § 1001, which makes it a crime knowingly and willfully to make a false statement "in any matter within the jurisdiction of any department or agency of the United States." Respondent admittedly had lied in telling the FBI that his wife had been kidnaped, when, in fact, as the FBI determined upon investigation, she had left him voluntarily, and in also telling the Secret Service that his wife was involved in a plot to assassinate the President, when, in fact, the Secret Service, after investigating the charge and upon locating the wife, was told by her that she had left home to get away from respondent. The District Court granted respondent's motion to dismiss the indictment on the grounds that the investigations were not matters "within the jurisdiction" of the respective agencies, as that phrase is used in § 1001. The Court of Appeals affirmed, relying on its decision in a prior case that limited the term "jurisdiction" as used in § 1001 to "the power to make final or binding determinations."

Held: The language of § 1001 clearly encompasses criminal investigations conducted by the FBI and Secret Service, and nothing in the legislative history indicates that Congress intended a more restrictive reach for the statute. Pp. 479–484.

(a) A criminal investigation surely falls within the meaning of "any matter," and the FBI and Secret Service equally surely qualify as "department[s] or agenc[ies] of the United States." And the most natural, nontechnical meaning of "jurisdiction" is that it covers all matters confided to the authority of an agency or department. Understood in this way, the statutory phrase "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to its business. To limit the term "jurisdiction," as the Court of Appeals did, would exclude from the statute's coverage most, if not all, of the authorized activities of many federal departments and agencies, and thereby defeat Congress' purpose in using the broad inclusive language it did. Pp. 479–482.

(b) Policy arguments favoring a more limited construction of the statute will not change the result in this case. Resolution of the pros and

cons of whether a statute should sweep broadly or narrowly is for Congress. Pp. 482–484.

(c) The critical statutory language of § 1001 is not sufficiently ambiguous to permit the rule of lenity in construing criminal statutes to control here. P. 484.

(d) Any argument against retroactive application of this decision to respondent, even if he could establish reliance on the Court of Appeals' decision in the prior case, is unavailing, since conflicting cases from other Courts of Appeals made review of the merits by this Court and a decision against respondent's position reasonably forseeable. P. 484.

706 F. 2d 854, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Barbara E. Etkind argued the cause for the United States. With her on the briefs were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Joel M. Gershowitz.*

Albert N. Moskowitz, by appointment of the Court, 464 U. S. 1067, argued the cause for respondent. With him on the brief was *Raymond C. Conrad, Jr.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Larry Rodgers was charged in a two-count indictment with making "false, fictitious or fraudulent statements" to the Federal Bureau of Investigation (FBI) and the United States Secret Service, in violation of 18 U. S. C. § 1001.[1] Rodgers allegedly lied in telling the FBI that his wife had been kidnaped and in telling the Secret Service that his wife was involved in a plot to kill the President. Rodgers moved to dismiss the indictment for failure to state

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[1] Title 18 U. S. C. § 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

an offense on the grounds that the investigation of kidnapings and the protection of the President are not matters "within the jurisdiction" of the respective agencies, as that phrase is used in § 1001. The District Court for the Western District of Missouri granted the motion, and the United States Court of Appeals for the Eighth Circuit affirmed. We now reverse. The statutory language clearly encompasses criminal investigations conducted by the FBI and the Secret Service, and nothing in the legislative history indicates that Congress intended a more restricted reach for the statute.

On June 2, 1982, Larry Rodgers telephoned the Kansas City, Missouri, office of the FBI and reported that his wife had been kidnaped. The FBI spent over 100 agent hours investigating the alleged kidnaping only to determine that Rodgers' wife had left him voluntarily. Two weeks later, Rodgers contacted the Kansas City office of the Secret Service and reported that his "estranged girlfriend" (actually his wife) was involved in a plot to assassinate the President. The Secret Service spent over 150 hours of agent and clerical time investigating this threat and eventually located Rodgers' wife in Arizona. She stated that she left Kansas City to get away from her husband. Rodgers later confessed that he made the false reports to induce the federal agencies to locate his wife.

In granting Rodgers' motion to dismiss the indictment, the District Court considered itself bound by a prior decision of the Eighth Circuit in *Friedman* v. *United States*, 374 F. 2d 363 (1967). *Friedman* also involved false statements made to the FBI to initiate a criminal investigation. In that case, the Court of Appeals reversed the defendant's conviction under § 1001, holding that the phrase "within the jurisdiction," as used in that provision, referred only to "the power to make final or binding determinations." *Id.*, at 367.

The *Friedman* court noted that the current statutory language was first passed in 1934 at the urging of some of the newly created regulatory agencies. See S. Rep. No. 1202, 73d Cong., 2d Sess. (1934). A predecessor provision pun-

ished false statements only when made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. In 1934, Congress deleted the requirement of a specific purpose and enlarged the class of punishable false statements to include false statements made "in any matter within the jurisdiction of any department or agency of the United States." Act of June 18, 1934, ch. 587, 48 Stat. 996. The "immediate and primary purpose" of this amendment, the Eighth Circuit surmised, was to curtail the flow of false information to the new agencies, which was interfering with their administrative and regulatory functions.

> "Though the statute was drafted in broad inclusive terms, presumably due to the numerous agencies and the wide variety of information needed, there is nothing to indicate that Congress intended this statute to have application beyond the purposes for which it was created." 374 F. 2d, at 366.

Reading the term "jurisdiction" in this restrictive light, the Court of Appeals included within its scope the "power to make monetary awards, grant governmental privileges, or promulgate binding administrative and regulative determinations," while excluding "the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action." *Id.*, at 367. The court concluded that false statements made to the FBI were not covered by § 1001 because the FBI "had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry." *Id.*, at 368.

In the present case, the Court of Appeals adhered to its decision in *Friedman* and affirmed the dismissal of the indictment. The court acknowledged that two other Courts of Appeals had expressly rejected the reasoning of *Friedman*. See *United States* v. *Adler*, 380 F. 2d 917, 922 (CA2), cert.

denied, 389 U. S. 1006 (1967); *United States* v. *Lambert*, 501 F. 2d 943, 946 (CA5 1974) (en banc). But the Eighth Circuit found its own analysis more persuasive. We granted certiorari to resolve this conflict. 464 U. S. 1007 (1983).

It seems to us that the interpretation of § 1001 adopted by the Court of Appeals for the Eighth Circuit is unduly strained. Section 1001 expressly embraces false statements made "in *any* matter within the jurisdiction of *any* department or agency of the United States." (Emphasis supplied.) A criminal investigation surely falls within the meaning of "any matter," and the FBI and the Secret Service equally surely qualify as "department[s] or agenc[ies] of the United States." The only possible verbal vehicle for narrowing the sweeping language Congress enacted is the word "jurisdiction." But we do not think that that term, as used in this statute, admits of the constricted construction given it by the Court of Appeals.

"Jurisdiction" is not defined in the statute. We therefore "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U. S. 1, 9 (1962). The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines "jurisdiction" as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority." A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation. See *United States* v. *Adler*, *supra*, at 922 ("the word 'jurisdiction' as used in the statute must mean simply the power to act upon information when it is received"). Understood in this way, the phrase "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.

There are of course narrower, more technical meanings of the term "jurisdiction." For example, an alternative definition provided by Webster's is the "legal power to interpret and administer the law." See also Black's Law Dictionary 766 (5th ed. 1979). But a narrow, technical definition of this sort, limiting the statute's protections to judicial or quasi-judicial activities, clashes strongly with the sweeping, everyday language on either side of the term. It is also far too restricted to embrace some of the myriad governmental activities that we have previously concluded § 1001 was designed to protect. See, *e. g.*, *Bryson* v. *United States*, 396 U. S. 64 (1969) (affidavit filed by union officer with National Labor Relations Board falsely denying affiliation with Communist Party); *United States* v. *Bramblett*, 348 U. S. 503 (1955) (fraudulent representations by Member of Congress to Disbursing Office of House of Representatives); *United States* v. *Gilliland*, 312 U. S. 86 (1941) (false reports filed with Secretary of Interior on amount of petroleum produced from certain wells).

In all our prior cases interpreting this statutory language we have stressed that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." *Bryson* v. *United States*, *supra*, at 70 (citing *United States* v. *Adler*, *supra*). For example, in *United States* v. *Gilliland*, *supra*, at 91, we rejected a defendant's contention that the reach of the statute was confined "to matters in which the Government has some financial or proprietary interest." We noted that the 1934 amendment, which added the current statutory language, was not limited by any specific set of circumstances that may have precipitated its passage.

> "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction." 312 U. S., at 93.

Discussing the same amendment in *United States* v. *Bramblett*, *supra*, at 507, we concluded: "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." And in *Bryson* v. *United States*, *supra*, at 70–71, we noted the "valid legislative interest in protecting the integrity of official inquiries" and held that a "statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001."[2]

There is no doubt that there exists a "statutory basis" for the authority of the FBI and the Secret Service over the investigations sparked by respondent Rodgers' false reports. The FBI is authorized "to detect and prosecute crimes against the United States," including kidnaping. 28 U. S. C. § 533(1). And the Secret Service is authorized "to protect the person of the President." 18 U. S. C. § 3056. It is a perversion of these authorized functions to turn either agency into a Missing Person's Bureau for domestic squabbles. The knowing filing of a false crime report, leading to an investigation and possible prosecution, can also have grave consequences for the individuals accused of crime. See *United States* v. *Adler*, 380 F. 2d, at 922; *Friedman* v. *United States*, 374 F. 2d, at 377 (Register, J., dissenting). There is, therefore, a "valid legislative interest in protecting

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[2] Both respondent and the court below attempt to distinguish *Bryson* on the ground that the NLRB, unlike the FBI or the Secret Service, "is an agency with the power to adjudicate rights and establish regulations . . . ." App. to Pet. for Cert. 4a. See Brief for Respondent 16. But it is undisputed that in the matter at issue in *Bryson*, the NLRB was neither adjudicating rights nor establishing regulations. It was conducting an "official inquiry" or investigation, just as the FBI and the Secret Service were doing in the instant case. Unless one is simply to read the phrase "*any* department or agency of the United States" out of the statute, there is no justification for treating the investigatory activities of one agency as within the scope of § 1001 while excluding the same activities performed by another agency.

the integrity of [such] official inquiries," an interest clearly embraced in, and furthered by, the broad language of § 1001.

Limiting the term "jurisdiction" as used in this statute to "the power to make final or binding determinations," as the Court of Appeals thought it should be limited, would exclude from the coverage of the statute most, if not all, of the authorized activities of many "departments" and "agencies" of the Federal Government, and thereby defeat the purpose of Congress in using the broad inclusive language which it did. If the statute referred only to courts, a narrower construction of the word "jurisdiction" might well be indicated; but referring as it does to "any department or agency" we think that such a narrow construction is simply inconsistent with the rest of the statutory language.

The Court of Appeals supported its failure to give the statute a "literal interpretation" by offering several policy arguments in favor of a more limited construction. For example, the court noted that § 1001 carries a penalty exceeding the penalty for perjury[3] and argued that Congress could not have "considered it more serious for one to informally volunteer an untrue statement to an F. B. I. agent than to relate the same story under oath before a court of law." *Friedman* v. *United States*, *supra*, at 366. A similar argument was made and rejected in *United States* v. *Gilliland*, 312 U. S., at 95. The fact that the maximum possible penalty under § 1001 marginally exceeds that for perjury provides no indication of the particular penalties, within the permitted range, that Congress thought appropriate for each of the myriad violations covered by the statute. Section 1001 covers "a

[3] In fact, the only difference between the two penalties lies in the maximum possible fine. Title 18 U. S. C. § 1621 sets the general penalty for perjury at a fine of not more than $2,000 or imprisonment for not more than five years, or both. Section 1001 provides a fine of not more than $10,000 or imprisonment for not more than five years, or both. Congress has also provided a penalty identical to that of § 1001 for the more specific crime of perjury "in any proceedings before . . . any court or grand jury of the United States." 18 U. S. C. § 1623(a).

variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations." *Ibid.*

Perhaps most influential in the reasoning of the court below was its perception that "the spectre of criminal prosecution" would make citizens hesitant to report suspected crimes and thereby thwart "the important social policy that is served by an open line of communication between the general public and law enforcement agencies." *Friedman* v. *United States*, *supra*, at 369. But the justification for this concern is debatable. Section 1001 only applies to those who "knowingly and willfully" lie to the Government. It seems likely that "individuals acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F. B. I." *United States* v. *Adler*, *supra*, at 922. See also *United States* v. *Lambert*, 501 F. 2d, at 946; *Friedman* v. *United States*, *supra*, at 377 (Register, J., dissenting).[4]

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[4]The Eighth Circuit also expressed concern that a literal application of the statute would obviate the taking of oaths in judicial proceedings. "Since the Judiciary is an agency of the United States Government, a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Friedman* v. *United States*, 374 F. 2d, at 367. Several courts faced with that question have in fact held that § 1001 does not reach false statements made under oath in a court of law. See, *e. g.*, *United States* v. *Abrahams*, 604 F. 2d 386 (CA5 1979); *United States* v. *D'Amato*, 507 F. 2d 26 (CA2 1974) (holding limited to private civil actions); *United States* v. *Erhardt*, 381 F. 2d 173 (CA6 1967) *(per curiam)*. But they have mostly relied, not on a restricted construction of the term "jurisdiction," but rather on the phrase "department or agency." These courts have held that, although the federal judiciary is a "department or agency" within the meaning of § 1001 with respect to its housekeeping or administrative functions, the judicial proceedings themselves do not so qualify. *Abrahams*, *supra*, at 392–393; *Erhardt*, *supra*, at 175. See also *Morgan* v. *United States*, 114 U. S. App. D. C. 13, 16, 309 F. 2d 234, 237, cert. denied, 373 U. S. 917 (1962). We express no opinion on the validity of this line of cases.

Even if we were more persuaded than we are by these policy arguments, the result in this case would be unchanged. Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress. Its decision that the perversion of agency resources and the potential harm to those implicated by false reports of crime justifies punishing those who "knowingly and willfully" make such reports is not so "absurd or glaringly unjust," *Sorrells* v. *United States*, 287 U. S. 435, 450 (1932), as to lead us to question whether Congress actually intended what the plain language of § 1001 so clearly imports.

Finally, respondent urges that the rule of lenity in construing criminal statutes should be applied to § 1001, and that because the *Friedman* case has been on the books in the Eighth Circuit for a number of years a contrary decision by this Court should not be applied retroactively to him. The rule of lenity is of course a well-recognized principle of statutory construction, see, *e. g.*, *Williams* v. *United States*, 458 U. S. 279, 290 (1982), but the critical statutory language of § 1001 is not sufficiently ambiguous, in our view, to permit the rule to be controlling here. See *United States* v. *Bramblett*, 348 U. S., at 509–510. And any argument by respondent against retroactive application to him of our present decision, even if he could establish reliance upon the earlier *Friedman* decision, would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BOSE CORP. *v.* CONSUMERS UNION OF UNITED STATES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82–1246. Argued November 8, 1983—Decided April 30, 1984

Respondent published an article in its magazine evaluating the quality of numerous brands of loudspeaker systems, including one marketed by petitioner. Petitioner objected to statements in the article about its system, including one to the effect that the sound of individual musical instruments tended to wander "about the room." When respondent refused to publish a retraction, petitioner filed a product disparagement action in Federal District Court. The court ruled that petitioner was a "public figure" and that therefore, pursuant to the First Amendment as interpreted in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, to recover petitioner must prove by clear and convincing evidence that respondent made a false disparaging statement with "actual malice." Entering judgment for petitioner, the court found, based primarily on the testimony of the article's author (respondent's employee), that the article contained a false statement of "fact," because the sound of instruments heard through the speakers tended to wander "along the wall" between the speakers, rather than "about the room" as reported by respondent; that the author's testimony that the challenged statement was intended to mean "along the wall" was not credible; and that the statement was disparaging. On the basis of what it considered to be clear and convincing proof, the court concluded that petitioner had sustained its burden of proving that respondent had published the false statement with knowledge that it was false or with reckless disregard of its truth or falsity. The Court of Appeals reversed, holding that its review of the "actual malice" determination was not limited to the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a)—which provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"—and that it must perform a *de novo* review, independently examining the record to ensure that the District Court had applied properly the governing constitutional rule. Based on its review of the record, the Court of Appeals concluded that petitioner had not sustained its burden of proof.

Held:

1. The clearly-erroneous standard of Rule 52(a) does not prescribe the standard of review to be applied in reviewing a determination of actual

malice in a case governed by *New York Times Co.* v. *Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. Pp. 498–511.

(a) In cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression. However, the standard of review must be faithful to both Rule 52(a) and the *New York Times* rule of independent review, the conflict between the two rules being in some respects more apparent than real. For instance, Rule 52(a) does not forbid an examination of the entire record, and the constitutionally based rule of independent review permits giving "due regard" to the trial judge's opportunity to judge witnesses' credibility, as provided by Rule 52(a). Pp. 498–501.

(b) Rule 52(a) applies to findings of fact, but does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact. In a consideration of the possible application of Rule 52(a)'s distinction between questions of law and fact to the issue of "actual malice," three characteristics of the *New York Times* rule are relevant: (1) the common-law heritage of the rule, (2) the fact that its content is given meaning through case-by-case adjudication, and (3) the fact that the constitutional values protected by it make it imperative that judges make sure that it is correctly applied. Pp. 501–503.

(c) The requirement of independent appellate review enunciated in *New York Times* reflects a deeply held conviction that judges—particularly Members of this Court—must exercise such review in order to preserve precious constitutional liberties. Under *New York Times*, the question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is ultimately a question of federal constitutional law. Pp. 503–511.

2. The Court of Appeals correctly concluded that there is a significant difference between proof of actual malice and mere proof of falsity, and that the requisite additional proof was lacking in this case. The testimony of the article's author did not constitute clear and convincing evidence of actual malice. The fact that he attempted to rationalize the mistake as to the article's use of the phrase "about the room" does not establish that he realized the inaccuracy at the time of publication. The choice of the language used, though reflecting a misconception, did not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Even accepting all of the District Court's purely

factual findings, nevertheless, as a matter of law, the record does not contain clear and convincing evidence that respondent or its employee prepared the article with knowledge that it contained a false statement, or with reckless disregard of the truth. Pp. 511–513.

692 F. 2d 189, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., concurred in the judgment. WHITE, J., filed a dissenting opinion, *post*, p. 515. REHNQUIST, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 515.

Charles Hieken argued the cause for petitioner. With him on the briefs was *Blair L. Perry*.

Michael N. Pollet argued the cause for respondent. With him on the brief were *Marshall Beil* and *Carol A. Schrager*.*

JUSTICE STEVENS delivered the opinion of the Court.

An unusual metaphor in a critical review of an unusual loudspeaker system gave rise to product disparagement litigation that presents us with a procedural question of first impression: Does Rule 52(a) of the Federal Rules of Civil Procedure prescribe the standard to be applied by the Court of Appeals in its review of a District Court's determination that a false statement was made with the kind of "actual malice" described in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)?

In the May 1970 issue of its magazine, Consumer Reports, respondent published a seven-page article evaluating the quality of numerous brands of medium-priced loudspeakers. In a boxed-off section occupying most of two pages, respondent commented on "some loudspeakers of special interest,"

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *James F. McHugh*, *Charles S. Sims*, and *John Reinstein*; and for New York Times Co. et al. by *Floyd Abrams*, *Dean Ringel*, *Devereux Chatillon*, *Robert Sack*, *Alice Neff Lucan*, *Corydon B. Dunham*, *David Otis Fuller, Jr.*, *W. Terry Maguire*, *Richard M. Schmidt, Jr.*, *R. Bruce Rich*, and *Peter C. Gould*.

one of which was the Bose 901—an admittedly "unique and unconventional" system that had recently been placed on the market by petitioner.[1] After describing the system and some of its virtues, and after noting that a listener "could pinpoint the location of various instruments much more easily with a standard speaker than with the *Bose* system," respondent's article made the following statements:

> "Worse, individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists." Plaintiff's Exhibit 2, p. 274.

After stating opinions concerning the overall sound quality, the article concluded: "We think the *Bose* system is so unusual that a prospective buyer must listen to it and judge it for himself. We would suggest delaying so big an investment until you were sure the system would please you after the novelty value had worn off." *Id.*, at 275.

Petitioner took exception to numerous statements made in the article, and when respondent refused to publish a retraction, petitioner commenced this product disparagement action in the United States District Court for the District of Massachusetts.[2] After a protracted period of pretrial

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[1] In introducing the loudspeaker system to the marketplace, petitioner emphasized the unconventional nature of the system and actively solicited reviews in numerous publications thereby inviting critical evaluation and comment on the unique qualities of the system. 508 F. Supp. 1249, 1273 (Mass. 1981).

[2] Federal jurisdiction over the product disparagement claim was based on diversity of citizenship, 28 U. S. C. § 1332(a)(1). The law of New York and Massachusetts, viewed by the parties as in accord in this area, governed the product disparagement claim. 508 F. Supp., at 1259, n. 17. The District Court held that under the applicable state law, plaintiff had

discovery, the District Court denied respondent's motion for summary judgment, 84 F. R. D. 682 (1980), and conducted a 19-day bench trial on the issue of liability. In its lengthy, detailed opinion on the merits of the case, 508 F. Supp. 1249 (1981), the District Court ruled in respondent's favor on most issues.[3] Most significantly, the District Court ruled that the petitioner is a "public figure" as that term is defined in *Gertz*

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the burden of proving, by a preponderance of the evidence, that the statements in issue were false and disparaging, and also had the burden of establishing actual damages in order to recover. *Id.*, at 1259–1260. In addition to the product disparagement claim, petitioner alleged claims for unfair competition and a violation of the Lanham Act, 15 U. S. C. § 1121. The District Court held that neither of those claims had been proved. 508 F. Supp., at 1277.

[3] Petitioner's attack on the article included contentions that it was misleading in referring to two persons as a "panel" and in creating the impression that evaluations of loudspeaker quality are objective rather than subjective judgments. While the District Court agreed with petitioner on these points, it ruled that they did not entitle petitioner to relief. *Id.*, at 1260–1262. Petitioner also argued that the overall sound quality of the Bose 901 should have been rated higher by the reviewers. The District Court rejected this claim, observing that all of the testimony, including that of Dr. Bose, revealed that the evaluation of a speaker's "sound quality" or "accuracy" is a "subjective matter," and hence in the final analysis is "nothing more than an opinion and, as such, it cannot be proved to be true or false." *Id.*, at 1262. The court also found that petitioner had failed to prove false a statement recommending use of an amplifier of 50 watts per channel to achieve the "deepest" bass response with the speakers, observing that the parties had conceded that the power requirements of the speakers were readily and objectively ascertainable. *Id.*, at 1263–1264. The court also found that petitioner had failed to prove that the person primarily responsible for the article was biased by reason of his financial interest in eventually marketing a speaker on which he had obtained a patent. On the other hand, the District Court rejected respondent's argument that there could be no actual malice because respondent had no motive to distort the facts; the District Court identified two possible reasons for the disparagement, first, the "scant proof" that respondent had a "built in bias" against "higher priced products" and second, a suggestion in the testimony that respondent resorted to "sarcasm" to boost circulation. *Id.*, at 1275–1276. The District Court did not, however, rely upon these possible motivations as affirmative proof of actual malice. See *id.*, at 1276–1277.

v. *Robert Welch, Inc.*, 418 U. S. 323, 342, 345, 351–352 (1974), for purposes of this case and therefore the First Amendment, as interpreted in *New York Times Co.* v. *Sullivan*, 376 U. S., at 279–280, precludes recovery in this product disparagement action unless the petitioner proved by clear and convincing evidence that respondent made a false disparaging statement with "actual malice."

On three critical points, however, the District Court agreed with petitioner. First, it found that one sentence in the article contained a "false" statement of "fact" concerning the tendency of the instruments to wander.[4] Based primarily on testimony by the author of the article, the District Court found that instruments heard through the speakers tended to wander "along the wall," rather than "about the room" as reported by respondent.[5] Second, it found that

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[4] In its ruling on respondent's motion for summary judgment, the District Court had held that the question whether respondent's panelists "actually heard instruments grow to gigantic proportions or wander about the room is a question of fact, not opinion . . . ." 84 F. R. D. 682, 684 (1980). In support of the motion for summary judgment, respondent had submitted an affidavit by one of the panelists, Arnold Seligson, stating that the article accurately reported what was heard in the tests and "I know what I heard," while petitioner had submitted an affidavit by Dr. Bose, who designed the Bose 901, stating in substance that "the phenomenon of widened and wandering instruments . . . is a scientific impossibility." *Ibid.*

[5] Although at one point the District Court seemed to suggest that the instruments, *i. e.*, the sound, did not wander at all, relying on a review in another publication stating that *"each instrument has its prescribed space—and it stays there,"* 508 F. Supp., at 1268 (emphasis supplied by the District Court) (citation omitted), the District Court had previously stated that some degree of "movement" of sound between loudspeakers is common to all systems and its discussion of liability indicates that respondent could have truthfully reported that the sound tended to wander "along the wall," or at least "seemed" to wander along the wall. It is not entirely clear that the District Court made a finding of fact as such regarding where the sound tended to wander. Indeed, it is not entirely clear that he found as a *fact* that the sound did not wander about the room. Rather, as discussed more extensively *infra*, at 493–497, the finding seemed to be that the "panel" conducting the test did not subjectively perceive the sound to

the statement was disparaging. Third, it concluded "on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity." 508 F. Supp., at 1277.[6] Judgment was entered for petitioner on the product disparagement claim.[7]

The United States Court of Appeals for the First Circuit reversed. 692 F. 2d 189 (1982). The court accepted the finding that the comment about wandering instruments was

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be wandering "about the room," but rather perceived it to be wandering "across the room." Just where the sound did "wander," in reality, did not appear to be the focus of the decision, though there was conflicting testimony concerning whether it was "scientifically impossible" for sound to wander "about" the room, or to "seem" to wander "about" the room. See 508 F. Supp., at 1267–1269, 1276–1277.

[6] In its ruling on the motion for summary judgment, the District Court assumed, without deciding, that the actual-malice standard would be applicable in the case and expressly recognized that falsity alone does not prove that statements were made with actual malice, observing that additional facts are required, and that there must be clear and convincing evidence on this question. 84 F. R. D., at 684–685. In holding that there was a material issue of "fact" (a label we use advisedly) on actual malice, the District Court recounted petitioner's argument that the panelists must have *known* the statements concerning enlarged and wandering instruments were false because they *were* false, *ibid.* ("[A]ccording to the plaintiff, the panel could not have heard these phenomena and the statement that they did hear them was false. The plaintiff further contends that because Seligson was a member of the listening panel . . . he must have known that the statement was false . . ."). The court also noted petitioner's evidence concerning Seligson's patent on a speaker system, and indulging in all reasonable inferences favorable to the plaintiff, concluded that a genuine issue of material fact existed on the question of actual malice. *Id.*, at 686.

[7] A separate trial before a different judge on the issue of damages resulted in a finding that the false disparaging statement resulted in a sales loss of 824 units, each of which would have produced a net profit of $129, causing petitioner damages of $106,296. Petitioner also was awarded $9,000 for expenses incurred in an attempt to mitigate damages. Judgment for the total amount, plus interest, was entered by the District Court. 529 F. Supp. 357 (1981).

disparaging. It assumed, without deciding, that the statement was one of fact, rather than opinion, and that it was false, observing that "stemming at least in part from the uncertain nature of the statement as one of fact or opinion, it is difficult to determine with confidence whether it is true or false." *Id.*, at 194. After noting that petitioner did not contest the conclusion that it was a public figure, or the applicability of the *New York Times* standard, the Court of Appeals held that its review of the "actual malice" determination was not "limited" to the clearly-erroneous standard of Rule 52(a); instead, it stated that it "must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." *Id.*, at 195. It added, however, that it "[was] in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact." *Ibid.* Based on its own review of the record, the Court of Appeals concluded:

> "[W]e are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the article—perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice." *Id.*, at 197.[8]

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[8]Judge Campbell concurred specially to emphasize the fact that the Court of Appeals had not passed on the merits of the District Court's holding that petitioner was a public figure. We, of course, also do not pass on that question.

We observe that respondent's publication of Consumer Reports plainly would qualify it as a "media" defendant in this action under any conceivable

We granted certiorari to consider whether the Court of Appeals erred when it refused to apply the clearly-erroneous standard of Rule 52(a) to the District Court's "finding" of actual malice. 461 U. S. 904 (1983).

I

To place the issue in focus, it is necessary to state in somewhat greater detail (a) the evidence on the "actual malice" issue; and (b) the basis for the District Court's determination.

Evidence of Actual Malice.

At trial petitioner endeavored to prove that the key sentence embodied three distinct falsehoods about instruments heard through the Bose system: (1) that their size seemed grossly enlarged; (2) that they seemed to move; and (3) that their movement was "about the room."

Although a great deal of the evidence concerned the first two points, the District Court found that neither was false. It concluded that the average reader would understand that the reference to enlarged instruments was intended to describe the size of the area from which the sound seemed to emanate rather than to any perception about the actual size of the musical instruments being played, rejecting as "absurd" the notion that readers would interpret the figurative language literally. 508 F. Supp., at 1266.[9] After referring to testimony explaining that "a certain degree of movement

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definition of that term. Hence, the answer to the question presented in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, cert. granted, 464 U. S. 959 (1983), could not affect this case and we naturally express no view at this time on that question.

[9] "Therefore, the plaintiff did not present any evidence to contradict the defendant's evidence which tended to show that when listening to the Bose 901 a listener could and does perceive that the apparent sound source is very large. Thus, the court concludes that the plaintiff has not sustained its burden of proof by a preponderance of the evidence that the defendant's statement—'instruments . . . seemed to grow to gigantic proportions'—was false." 508 F. Supp., at 1267.

of the location of the apparent sound source is to be expected with all stereo loudspeaker systems," the District Court recognized that the statement was accurate insofar as it reported that "instruments . . . tended to wander . . . ." *Id.*, at 1267. Thus, neither the reference to the apparent size of the instruments, nor the reference to the fact that instruments appeared to move, was false.[10]

The statement that instruments tended to wander "about the room" was found false because what the listeners in the test actually perceived was an apparent movement back and forth along the wall in front of them and between the two speakers. Because an apparent movement "about the room"—rather than back and forth—would be so different from what the average listener has learned to expect, the District Court concluded that "the location of the movement of the apparent sound source is just as critical to a reader as the fact that movement occurred." *Ibid.*

The evidence concerning respondent's knowledge of this falsity focused on Arnold Seligson, an engineer employed by respondent. Seligson supervised the test of the Bose 901 and prepared the written report upon which the published article was based. His initial in-house report contained this sentence: "'Instruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room; a violin seemed about 10 ft. wide, a piano stretched from wall to wall, etc.'" *Id.*, at 1264, n. 28. Since the editorial revision from "around the room" to "about the room" did not change the meaning of the false statement, and since there was no evidence that the editors were aware of the inaccuracy in the original report, the actual-malice determination rests entirely on an evaluation of Seligson's state of mind when he wrote his initial report, or when he checked the article against that report.

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[10] Thus, respondent prevailed on both of the issues of fact that had been identified at the summary judgment stage of the proceedings. See n. 4, *supra*.

Seligson was deposed before trial and testified for almost six days at the trial itself. At one point in his direct examination, he responded at length to technical testimony by Dr. Bose, explaining the scientific explanation for the apparent movement of the source of sound back and forth across a wall. App. 117–122. The trial judge then questioned Seligson, and that questioning revealed that the movement which Seligson had heard during the tests was confined to the wall.[11] During his cross-examination, at counsel's request he drew a rough sketch of the movement of the sound source that he intended to describe with the words "tended to wander about the room"; that sketch revealed a back and forth movement along the wall between the speakers. He was then asked:

> "Q. Mr. Seligson, why did you use the words 'tended to wander about the room' to describe what you have drawn on the board?
>
> "A. Well, I don't know what made me pick that particular choice of words. Would you have been more sat-

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[11] The following questions were asked and answered:

"[Q.] Does that explain, in your opinion, the lateral movement of the instrument?

"[A.] Yes.

"[Q.] I think your statement in the article which says they moved into the room, just as if they came forward, as well—

"[A.] The example given for the movement into the room refers only to a widened violin and a widened piano and was meant to imply only that the widening and movement was across the rear wall from the two speakers.

. . . . . .

"[Q.] 'It tended to wander about the room.' It didn't say from side to side or against the walls alone, but it says—

"[A.] I believe the next sentence is meant to explain that. It then says, 'For instance,' as an example of the effect. . . .

"[Q.] The word 'about' means around, doesn't it?

"[A.] It was, your Honor, it was meant to mean about the rear wall, between the speakers.

"[Q.] That isn't what it says, though.

"[A.] I understand." App. 122–124.

isfied if we said 'across,'—I think not—instead of before. I have the feeling you would have objected in either event. The word 'about' meant just as I drew it on the board. Now, I so testified in my deposition." *Id.*, at 169.[12]

The District Court's Actual-Malice Determination.

The District Court's reasons for finding falsity in the description of the location of the movement of the wandering instruments provided the background for its ruling on actual malice. The court concluded that "no reasonable reader" would understand the sentence as describing lateral movement along the wall. Because the "average reader" would interpret the word "about" according to its "plain ordinary meaning," the District Court unequivocally rejected Seligson's testimony—and respondent's argument—that the sentence, when read in context, could be understood to refer to lateral movement.[13]

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[12] These additional questions were then asked and answered:

"Q. Would it have been more accurate in your judgment to say that the instruments tended to move back and forth between the two speakers?

"A. No, I don't think so, taken in context of the way it's described. Remember, the effect is carefully described in a few sentences later. It's hard to mistake.

"Q. Is there anything in the article which you think conveys to the reader the idea that the instruments stayed down at one end of the room and didn't come out and wander about, like you wandered about, where you have drawn the orange line?

"A. Yes.

"Q. What is that?

"A. I would think that the reader would get that from reading that a violin appeared to be ten feet wide and a piano stretched from wall to wall. This is no hint of depth or whatever, entering into the room." *Id.*, at 169–170.

[13] The District Court buttressed this conclusion by pointing out that petitioner had received no complaints from purchasers about any wandering instruments, and that no other reviews of the Bose 901 had referred to wandering instruments. On the contrary, a review quoted by the District

On similar reasoning the District Court found Seligson's above-quoted explanation of the intended meaning of the sentence incredible. The District Court reasoned:

> "Thus, according to Seligson, the words used in the Article—'About the room'—mean something different to him than they do to the populace in general. If Seligson is to be believed, at the time of publication of the Article he interpreted, and he still interprets today, the words 'about the room' to mean 'along the wall.' After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain ordinary meaning.
>
> "Based on the above finding that Seligson's testimony to the contrary is not credible, the Court further finds that at the time of the Article's publication Seligson knew that the words 'individual instruments . . . tended to wander about the room' did not accurately describe the effects that he and Lefkow had heard during the 'special listening test.' Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity." 508 F. Supp., at 1276–1277.

Court commented that "each instrument has its prescribed space—and it stays there." See n. 5, *supra*. This evidence, however, was more probative of falsity in ascribing any movement at all to the sound source than of falsity in describing the location of the movement. As we have pointed out, the District Court found that the article was truthful insofar as it stated that apparent movement occurred.

Notably, the District Court's ultimate determination of actual malice was framed as a conclusion and was stated in the disjunctive. Even though the District Court found it impossible to believe that Seligson—at the time of trial—was truthfully maintaining that the words "about the room" could fairly be read, in context, to describe lateral movement rather than irregular movement throughout the room, the District Court did not identify any independent evidence that Seligson realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication.[14]

II

This is a case in which two well-settled and respected rules of law point in opposite directions.

Petitioner correctly reminds us that Rule 52(a) provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

We have repeatedly held that the Rule means what it says. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 855–856 (1982); *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–396 (1948). It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of "fact."[15] In this case, since the trial judge expressly commented on Seligson's credibility, petitioner argues that the

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[14] The District Court expressly rejected petitioner's exhaustive attempt to prove that Seligson had a continuing interest in marketing his own speaker and therefore deliberately distorted the review. 508 F. Supp., at 1275.

[15] Indeed, in *Herbert* v. *Lando*, 441 U. S. 153, 170 (1979), we referred in passing to actual malice as "ultimate fact."

Court of Appeals plainly erred when it refused to uphold the District Court's actual-malice "finding" under the clearly-erroneous standard of Rule 52(a).

On the other hand, respondent correctly reminds us that in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S., at 284–286. See also *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 933–934 (1982); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6, 11 (1970); *St. Amant* v. *Thompson*, 390 U. S. 727, 732–733 (1968). Although such statements have been made most frequently in cases to which Rule 52(a) does not apply because they arose in state courts, respondent argues that the constitutional principle is equally applicable to federal litigation. We quite agree; surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts.

Our standard of review must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co.* v. *Sullivan*. The conflict between the two rules is in some respects more apparent than real. The *New York Times* rule emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, *supra*, at 395 (emphasis supplied). Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to

observe the demeanor of the witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due. Indeed, as we previously observed, the Court of Appeals in this case expressly declined to second-guess the District Judge on the credibility of the witnesses.

The requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. The same "clearly erroneous" standard applies to findings based on documentary evidence as to those based entirely on oral testimony, see *United States Gypsum Co., supra,* at 394, but the presumption has lesser force in the former situation than in the latter. Similarly, the standard does not change as the trial becomes longer and more complex, but the likelihood that the appellate court will rely on the presumption tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours.[16] One might therefore assume that the cases in which the appellate courts have a duty to exercise

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[16] "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. See, *e. g., Beyer* v. *LeFevre,* 186 U. S. 114. Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner* v. *United States,* 322 U. S. 665, 670–671 (1944). See generally *Pullman-Standard* v. *Swint,* 456 U. S. 273, 286–287, n. 16 (1982).

independent review are merely those in which the presumption that the trial court's ruling is correct is particularly weak. The difference between the two rules, however, is much more than a mere matter of degree. For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.

Rule 52(a) applies to findings of fact, including those described as "ultimate facts" because they may determine the outcome of litigation. See *Pullman-Standard* v. *Swint*, 456 U. S., at 287. But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. See *ibid.*; *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S., at 855, n. 15. Nor does Rule 52(a) "furnish particular guidance with respect to distinguishing law from fact." *Pullman Standard* v. *Swint*, 456 U. S., at 288. What we have characterized as "the vexing nature" of that distinction, *ibid.*, does not, however, diminish its importance, or the importance of the principles that require the distinction to be drawn in certain cases.[17]

In a consideration of the possible application of the distinction to the issue of "actual malice," at least three characteristics of the rule enunciated in the *New York Times* case are

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[17] A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.

relevant. First, the common-law heritage of the rule itself assigns an especially broad role to the judge in applying it to specific factual situations. Second, the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law. Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied. A few words about each of these aspects of the rule are appropriate.

The federal rule that prohibits a public official from recovering damages for a defamatory falsehood unless he proves that the false "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times*, 376 U. S., at 279–280, has its counterpart in rules previously adopted by a number of state courts and extensively reviewed by scholars for generations.[18] The earlier defamation cases, in turn, have a kinship to English cases considering the kind of motivation that must be proved to support a common-law action for deceit.[19] It has long been recognized that the formulation of a rule of this kind "allows the judge the maximum of power in passing judgment in the particular case."[20]

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[18] A representative list of such cases and comments is found in footnote 20 of the Court's opinion in *New York Times*, 376 U. S., at 280.

[19] Under what has been characterized as the "honest liar" formula, fraud could be proved "when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." *Derry* v. *Peek*, 14 App. Cas. 337, 374 (1889).

[20] "Probably the formula is less definite than it seems. Its limitations are perhaps largely a matter of language color. As do most English formulas, it allows the judge the maximum of power in passing judgment in the particular case. It restricts the jury as neatly as can be done to the function of evaluating the evidence. But judgment under this formula can be turned either way with equal facility on any close case." L. Green, Judge and Jury 286 (1930) (Chapter 10 of this work by Professor Green, cited herein, is also published in 16 Va. L. Rev. 749 (1930)).

Moreover, the exercise of this power is the process through which the rule itself evolves and its integrity is maintained.[21] As we have explained, the meaning of some concepts cannot be adequately expressed in a simple statement:

> "These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. 'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication." *St. Amant* v. *Thompson*, 390 U. S., at 730–731.

When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance. This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of "unprotected" speech.

The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a

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[21] "And it must be kept in mind that the judge has another distinct function in dealing with these elements, which though not frequently called into play, is of the utmost importance. It involves the determination of the *scope* of the general formula, or some one of its elements. It comes into play in the marginal cases. It requires the judge to say what sort of conduct can be considered as condemned under the rules which are employed in such cases. It is the function through which the formulas and rules themselves were evolved, through which their integrity is maintained and their availability determined." Green, *supra*, at 304.

whole. Under our Constitution "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 339–340 (footnote omitted). Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942).

Libelous speech has been held to constitute one such category, see *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952); others that have been held to be outside the scope of the freedom of speech are fighting words, *Chaplinsky* v. *New Hampshire*, *supra*, incitement to riot, *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969), obscenity, *Roth* v. *United States*, 354 U. S. 476 (1957), and child pornography, *New York* v. *Ferber*, 458 U. S. 747 (1982).[22] In each of these

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[22] Commercial speech was once regarded as unprotected by the First Amendment, see *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), but in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), we rejected that broad conclusion. Though false and misleading commercial speech could be deemed to represent a category of unprotected speech, see *ibid.*, the rationale for doing so would be essentially the same as that involved in the libel area, viz., "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974). Moreover, since a commercial advertiser usually "seeks to disseminate information about a specific product or service he himself provides and presumably knows more about than anyone else," *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 772, n. 24, there is a minimal "danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression." *Id.*, at 777 (Stewart, J., concurring).

Statements made by public employees in their employment capacity and not touching on matters of public concern may be considered unprotected

areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.[28] The principle of viewpoint neutrality that underlies the First Amendment itself, see *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972), also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected. See generally *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

We have exercised independent judgment on the question whether particular remarks "were so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace,'" *Street* v. *New York*, 394 U. S. 576, 592 (1969), and on the analogous question whether advocacy is directed to inciting or producing

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in the sense that employment-related sanctions may be imposed on the basis of such statements. See *Connick* v. *Myers*, 461 U. S. 138 (1983); *Givhan* v. *Western Line Consolidated School District*, 439 U. S. 410 (1979); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968).

[28] The risk of broadening a category of unprotected speech may explain why one Member of this Court preferred a candid statement—"I know it when I see it"—of his concept of the judicial function to a premature attempt to fashion an all encompassing "shorthand description" of obscenity. See *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring).

imminent lawless action, *Hess* v. *Indiana*, 414 U. S. 105, 108–109 (1973) *(per curiam);* compare *id.*, at 111 (REHNQUIST, J., dissenting) ("The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below"); *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963) (recognizing duty "to make an independent examination of the whole record"); *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946) ("[W]e are compelled to examine for ourselves the statements in issue . . . to see whether or not they do carry a threat of clear and present danger . . . or whether they are of a character which the principles of the First Amendment . . . protect").[24]

Similarly, although under *Miller* v. *California*, 413 U. S. 15 (1973), the questions of what appeals to "prurient interest" and what is "patently offensive" under the community standard obscenity test are "essentially questions of fact," *id.*, at 30, we expressly recognized the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," *id.*, at 25.[25] We have therefore

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[24] See also *Fiske* v. *Kansas*, 274 U. S. 380, 385–387 (1927) (explaining that this Court will review findings of fact by a state court where a federal right has been denied on the basis of a fact without evidence to support it and where a conclusion of law as to a federal right and a finding of fact are so intermingled to require analysis of the facts); *Gitlow* v. *New York*, 268 U. S. 652, 665–666 (1925); *Schaefer* v. *United States*, 251 U. S. 466, 483 (1920) (Brandeis, J., dissenting); see generally *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613–614 (1973) (explaining *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); and *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940)).

[25] In support of this statement, we cited Justice Harlan's opinion in *Roth* v. *United States*, 354 U. S. 476, 497–498 (1957), where he observed:

"The Court seems to assume that 'obscenity' is a peculiar *genus* of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether 'obscenity,' as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of

rejected the contention that a jury finding of obscenity *vel non* is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern. In *Jenkins* v. *Georgia*, 418 U. S. 153, 159–161 (1974), based on an independent examination of the evidence—the exhibition of a motion picture—the Court held that the film in question "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way . . . ." *Id.*, at 161.[28] And in its recent opinion identifying a new category of unprotected expression—child pornography—the Court expressly anticipated that an "independent

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classification, of 'fact,' to be entrusted to a factfinder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppress[i]ble within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

"I do not think that reviewing courts can escape this responsibility by saying that the trier of facts, be it a jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."

[28] Cf. *Hamling* v. *United States*, 418 U. S. 87, 100, 124 (1974) (holding that jury determination of obscenity was supported by the evidence and consistent with the applicable constitutional standard while reviewing petitioner's sufficiency of the evidence arguments regarding other issues under the test of *Glasser* v. *United States*, 315 U. S. 60 (1942)). See generally *Jacobellis* v. *Ohio*, 378 U. S., at 187–190 (opinion of BRENNAN, J.) (*de novo* review required in obscenity cases); *id.*, at 202–203 (Warren, C. J., dissenting) (intermediate standard of review).

examination" of the allegedly unprotected material may be necessary "to assure ourselves that the judgment . . . 'does not constitute a forbidden intrusion on the field of free expression.'" *New York* v. *Ferber*, 458 U. S., at 774, n. 28 (quoting *New York Times Co.* v. *Sullivan*, 376 U. S., at 285).

Hence, in *New York Times Co.* v. *Sullivan*, after announcing the constitutional requirement for a finding of "actual malice" in certain types of defamation actions, it was only natural that we should conduct an independent review of the evidence on the dispositive constitutional issue. We explained our action as follows:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U. S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden instrusion on the field of free expression." 376 U. S., at 285 (footnote omitted).[27]

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[27] This Court "has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the

In *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971), a case in which the Federal District Court had entered a directed verdict, we again conducted an independent examination of the evidence on the question of actual malice, labeling our definition of "actual malice" as a "constitutional rule" and stating that the question before us was whether that rule had been correctly applied to the facts of the case, *id.*, at 284. Again we stated that independent inquiries "of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-

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facts of the case.' *Jacobellis* v. *Ohio*, 378 U. S. 184, 190 (1964) [opinion of BRENNAN, J.]. The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review. See *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199, 205 n. 5 (1960)." *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 54 (1971) (opinion of BRENNAN, J., joined by BURGER, C. J., and BLACKMUN, J.). See generally *Adams* v. *Tanner*, 244 U. S. 590, 600 (1917) (Brandeis, J., dissenting) ("*Ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law").

In *New York Times Co.* v. *Sullivan*, we were reviewing a state-court judgment entered on a jury verdict. Respondent had contended that the Seventh Amendment precluded an independent review. Recognizing that the Seventh Amendment's ban on reexamination of facts tried by a jury applied to a case coming from the state courts, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 243–246 (1897); *The Justices* v. *Murray*, 9 Wall. 274 (1870); see generally *Parsons* v. *Bedford*, 3 Pet. 433 (1830), we found the argument without merit, relying on our statement in *Fiske* v. *Kansas*, 274 U. S., at 385–386, that review of findings of fact is appropriate "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

The intermingling of law and fact in the actual-malice determination is no greater in state or federal jury trials than in federal bench trials. See *supra*, at 499–500, and *infra*, at 512–513. And, of course, the limitation on appellate review of factual determinations under Rule 52(a) is no more stringent than the limitation on federal appellate review of a jury's factual determinations under the Seventh Amendment, which commands that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

examine the evidentiary basis on which those conclusions are founded,'" noting that "in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff." *Ibid.* (citations omitted).[28]

In *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 277 (1971) the Court held "as a matter of constitutional law" that the jury could not be allowed to determine the relevance of a defamatory statement to the plaintiff's status as a public figure. We explained that the jury's application of such a standard "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times*, *supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Ibid.*[29]

The requirement of independent appellate review reiterated in *New York Times Co.* v. *Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must

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[28] Justice Harlan, the lone dissenter in *Time, Inc.* v. *Pape*, observed that the Court had merely refound the facts in the case, but agreed that the Court was free to examine for itself the evidentiary bases upon which the decision below rested. He argued that this power need not be exercised in every case, but rather independent review of the evidence should be limited to cases in which certain "unusual factors" exist, such as "allegations of harassment." 401 U. S., at 294.

[29] A similar concern with the need to "preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities," *Schaefer* v. *United States*, 251 U. S., at 482 (dissenting opinion), was identified by Justice Brandeis in explaining the special risk in allowing jurors to evaluate the character of the "clear and present danger" presented by arguably seditious speech.

exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

III

The Court of Appeals was correct in its conclusions (1) that there is a significant difference between proof of actual malice[30] and mere proof of falsity, and (2) that such additional proof is lacking in this case.

The factual portion of the District Court's opinion may fairly be read as including the following findings: (1) Seligson's actual perception of the apparent movement of the sound source at the time the Bose 901 was tested was "along the wall" rather than "about the room"; (2) even when the words in the disputed sentence are read in the context of the entire article, neither the "average reader," nor any other intelligent person, would interpret the word "about" to mean "across"; (3) Seligson is an intelligent, well-educated person; (4) the words "about the room" have the same meaning for Seligson as they do for the populace in general; and (5) although he was otherwise a credible witness, Seligson's testimony that (a) he did not "know what made me pick that

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[30] The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S., at 280; see also *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 342; *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968); see generally W. Prosser, Law of Torts 771–772, 821 (4th ed. 1971).

particular choice of words" and (b) that the word "about" meant what he had drawn on the board, is not credible.

When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion. See *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573, 575 (1951). In this case the trial judge found it impossible to believe that Seligson continued to maintain that the word "about" meant "across." Seligson's testimony does not rebut any inference of actual malice that the record otherwise supports, but it is equally clear that it does not constitute clear and convincing evidence of actual malice. Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made—that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication.

Aside from Seligson's vain attempt to defend his statement as a precise description of the nature of the sound movement, the only evidence of actual malice on which the District Court relied was the fact that the statement was an inaccurate description of what Seligson had actually perceived. Seligson of course had insisted "I know what I heard." The trial court took him at his word, and reasoned that since he did know what he had heard, and he knew that the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it. "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account *of events that speak for themselves*." *Time, Inc.* v. *Pape*, 401 U. S., at 285. See generally *The Santissima Trinidad*, 7 Wheat. 283, 338–339 (1822). Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer.

Time, Inc. v. *Pape, supra,* at 290. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time.

The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. 401 U. S., at 292. "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times, Butts, Gertz,* and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Herbert* v. *Lando,* 441 U. S. 153, 171–172 (1979). "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co.* v. *Sullivan,* 376 U. S., at 271–272 (citation omitted).

The Court of Appeals entertained some doubt concerning the ruling that the *New York Times* rule should be applied to a claim of product disparagement based on a critical review of a loudspeaker system. We express no view on that ruling, but having accepted it for purposes of deciding this case, we agree with the Court of Appeals that the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment. We may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that Seligson or his employer prepared the loudspeaker article with knowledge that it contained a false statement, or with reckless disregard of the truth.

It may well be that in this case, the "finding" of the District Court on the actual-malice question could have been set aside under the clearly-erroneous standard of review, and we share the concern of the Court of Appeals that the statements at issue tread the line between fact and opinion. Moreover, the analysis of the central legal question before us may seem out of place in a case involving a dispute about the sound quality of a loudspeaker. But though the question presented reaches us on a somewhat peculiar wavelength, we reaffirm the principle of independent appellate review that we have applied uncounted times before. We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co.* v. *Sullivan*.[31] Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[31] There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co.* v. *Sullivan* and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a *"de novo"* review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a *de novo* review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual-malice determination.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE WHITE, dissenting.

Although I do not believe that the "reckless disregard" component of the *New York Times* malice standard is a question of historical fact, I agree with JUSTICE REHNQUIST that the actual-knowledge component surely is. Here, the District Court found that the defamatory statement was written with actual knowledge of falsity. The Court of Appeals thus erred in basing its disagreement with the District Court on its *de novo* review of the record. The majority is today equally in error. I would remand to the Court of Appeals so that it may perform its task under the proper standard.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

There is more than one irony in this "Case of the Wandering Instruments," which subject matter makes it sound more like a candidate for inclusion in the "Adventures of Sherlock Holmes" than in a casebook on constitutional law. It is ironic in the first place that a constitutional principle which originated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system.

It is also ironic that, in the interest of protecting the First Amendment, the Court rejects the "clearly erroneous" standard of review mandated by Federal Rule of Civil Procedure 52(a) in favor of a "*de novo*" standard of review for the "constitutional facts" surrounding the "actual malice" determination. But the facts dispositive of that determination—actual knowledge or subjective reckless disregard for truth—involve no more than findings about the *mens rea* of an author, findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context. Unless "actual malice" now means something different from the definition given to the term 20 years ago by this

Court in *New York Times*, I do not think that the constitutional requirement of "actual malice" properly can bring into play any standard of factual review other than the "clearly erroneous" standard.

In this case the District Court concluded by what it found to be clear and convincing evidence that respondent's engineer Arnold Seligson had written the defamatory statement about Bose's product with actual knowledge that it was false. It reached that conclusion expressly relying on its determination about the credibility of Seligson's testimony. 508 F. Supp. 1249, 1276–1277 (1981). On appeal there was no issue as to whether the District Court had properly understood what findings were legally sufficient to establish "actual malice" nor was there any issue as to the necessary quantum of proof nor the proper allocation of the burden of proof of "actual malice." The issue on appeal thus was only the propriety of the District Court's factual conclusion that Bose had actually proved "actual malice" in this case. Yet the Court of Appeals never rebutted the District Court's conclusion that Seligson had actual knowledge that what he printed was false. Instead it concluded after *de novo* review that Seligson's language was merely "imprecise" and that as such, it would not "support an inference of actual malice." 692 F. 2d 189, 197 (1982).

It is unclear to me just what that determination by the Court of Appeals has to do with the *mens rea* conclusion necessary to the finding of "actual malice" and with the District Court's finding of actual knowledge here. In approving the Court of Appeals' *de novo* judgment on the "actual malice" question, for all the factual detail and rehearsal of testimony with which the majority's opinion is adorned, the Court never quite comes to grips with what factual finding it must focus on. At one point we are told that "[t]he statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies," *ante*, at 513, suggesting that the disparaging

statement was perhaps not even false, or at any rate not false *enough*. One paragraph later, we are told that "as a matter of law . . . the record does not contain clear and convincing evidence that Seligson or his employer prepared the loudspeaker article with knowledge that it contained a false statement, or with reckless disregard of the truth." *Ante*, at 513. The Court remarks that the question presented "reaches us on a somewhat peculiar wavelength," *ante*, at 514, but that is scarcely a reason for transmitting the answer on an equally peculiar wavelength.

In my view the problem results from the Court's attempt to treat what is here, and in other contexts always has been, a pure question of fact, as something more than a fact—a so-called "constitutional fact." The Court correctly points out that independent appellate review of facts underlying constitutional claims has been sanctioned by previous decisions of this Court where "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske* v. *Kansas*, 274 U. S. 380, 385–386 (1927). But in other contexts we have always felt perfectly at ease leaving state-of-mind determinations, such as the actual knowledge and recklessness determinations involved here, to triers of fact with only deferential appellate review—for example, in criminal cases where the burden of proving those facts is even greater than the "clear and convincing" standard applicable under *New York Times*.[1]

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[1] In attempting to justify independent appellate review of the "actual malice" determination, the majority draws an analogy to other cases which have attempted to define categories of unprotected speech, such as obscenity and child pornography cases, *New York* v. *Ferber*, 458 U. S. 747, 774, n. 28 (1982); *Miller* v. *California*, 413 U. S. 15 (1973); *Roth* v. *United States*, 354 U. S. 476 (1957), and cases involving words inciting anger or violence, *Hess* v. *Indiana*, 414 U. S. 105 (1973) *(per curiam)*; *Street* v. *New York*, 394 U. S. 576 (1969); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). To my mind, however, those cases more clearly involve the kind of

Presumably any doctrine of "independent review" of facts exists, not so that an appellate court may inexorably place its thumb on the scales in favor of the party claiming the constitutional right, but so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for.[2] But to me, the only shortcoming here is an

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mixed questions of fact and law which call for *de novo* appellate review than do the *New York Times* "actual malice" cases, which simply involve questions of pure historical fact.

For example, with respect to the obscenity cases, appellate courts perhaps are just as competent as are triers of fact to make determinations about whether material appeals to "prurient interests," whether it depicts sexual conduct in a "patently offensive" way, and whether the material lacks serious artistic value, *Miller* v. *California*, *supra*, at 24. In the words-inciting-violence cases, the necessary determinations, equally capable of *de novo* appellate review, are whether words are "'likely to provoke the *average* person to retaliation,'" *Street* v. *New York*, *supra*, at 592 (emphasis added) (quoting *Chaplinsky* v. *New Hampshire*, *supra*, at 574), or whether the "rational inference from the import of the language" is that it is "likely to produce *imminent* disorder." *Hess* v. *Indiana*, *supra*, at 109. None of those cases requires the kind of pure historical factual determination that the *New York Times* cases require: a determination as to the actual subjective state of mind of a *particular* person at a *particular* time.

[2]The Court correctly points out that in *New York Times Co.* v. *Sullivan*, we conducted independent appellate review of the facts underlying the "actual malice" determination. It is notable, however, that *New York Times* came to this Court from a state court after a jury trial, and thus presented the strongest case for independent factfinding by this Court. The factfinding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the factfinding process engaged in by a trial judge who makes written findings as here. Justifying independent review of facts found by a jury is easier because of the absence of a distinct "yes" or "no" in a general jury verdict as to a particular factual inquiry and because of the extremely narrow latitude allowed appellate courts to review facts found by a jury at common law. Thus it is not surprising to me that early cases espousing the notion of independent appellate review of "constitutional facts," such as *Fiske* v. *Kansas*, 274 U. S. 380 (1927), and *New York Times*, should have arisen out of the context of jury verdicts and that they then were perhaps only reflexively applied in other quite different contexts without further analysis. See *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971) (involving appellate review of a District Court's directed verdict).

appellate court's inability to make the determination which the Court mandates today—the *de novo* determination about the state of mind of a particular author at a particular time. Although there well may be cases where the "actual malice" determination can be made on the basis of objectively reviewable facts in the record, it seems to me that just as often it is made, as here, on the basis of an evaluation of the credibility of the testimony of the author of the defamatory statement. I am at a loss to see how appellate courts can even begin to make such determinations. In any event, surely such determinations are best left to the trial judge.

It is of course true as the Court recognizes that "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). But the *New York Times* rule adequately addresses the need to shield protected speech from the risk of erroneous factfinding by placing the burden of proving "actual malice" on the party seeking to penalize expression. I agree with Justice Harlan who, in commenting on the inappropriateness of *de novo* fact review of the "actual malice" determination, concluded that he could not

> "discern in those First Amendment considerations that led us to restrict the States' powers to regulate defamation of public officials any additional interest that is not served by the actual-malice rule of *New York Times*, *supra*, but is substantially promoted by utilizing [an appellate court] as the ultimate arbiter of factual disputes in those libel cases where no unusual factors, such as allegations of harassment or the existence of a jury verdict resting on erroneous instructions . . . are present." *Time, Inc.* v. *Pape*, 401 U. S. 279, 294 (1971) (dissenting opinion).

I think that the issues of "falsity" and "actual malice" in this case may be close questions, but I am convinced that the

District Court, which heard the principal witness for the respondent testify for almost six days during the trial, fully understood both the applicable law and its role as a finder of fact. Because it is not clear to me that the *de novo* findings of appellate courts, with only bare records before them, are likely to be any more reliable than the findings reached by trial judges, I cannot join the majority's sanctioning of factual second-guessing by appellate courts. I believe that the primary result of the Court's holding today will not be greater protection for First Amendment values, but rather only lessened confidence in the judgments of lower courts and more entirely factbound appeals.

I continue to adhere to the view expressed in *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982), that Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." There is no reason to depart from that rule here, and I would therefore reverse and remand this case to the Court of Appeals so that it may apply the "clearly erroneous" standard of review to the factual findings of the District Court.

WESTINGHOUSE ELECTRIC CORP. *v.* VAUGHN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-2042. Argued March 19, 1984—Decided April 30, 1984

Certiorari dismissed. Reported below: 702 F. 2d 137.

James W. Moore argued the cause for petitioner. With him on the briefs were *Walter A. Paulson II* and *Stuart I. Saltman.*

Clyde E. Murphy argued the cause for respondent. With him on the brief were *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, O. Peter Sherwood, Ronald L. Ellis, Judith Reed,* and *John W. Walker.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Robert E. Williams, Douglas S. McDowell,* and *Barbara L. Neilson* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPER, VIRGINIA *v.* ALLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82–1432. Argued November 2, 1983—Decided May 14, 1984

After respondents were arrested for nonjailable misdemeanors, petitioner, a Magistrate in a Virginia county, imposed bail, and when respondents were unable to meet the bail petitioner committed them to jail. Subsequently, respondents brought an action against petitioner in Federal District Court under 42 U. S. C. § 1983, claiming that petitioner's practice of imposing bail on persons arrested for nonjailable offenses under Virginia law and of incarcerating those persons if they could not meet the bail was unconstitutional. The court agreed and enjoined the practice, and also awarded respondents costs and attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. Determining that judicial immunity did not extend to injunctive relief under § 1983 and that prospective injunctive relief properly had been awarded against petitioner, the Court of Appeals affirmed the award of attorney's fees.

Held:

1. Judicial immunity is not a bar to prospective injunctive relief against a judicial officer, such as petitioner, acting in her judicial capacity. Pp. 528–543.

(a) Common-law principles of judicial immunity were incorporated into the United States judicial system and should not be abrogated absent clear legislative intent to do so. Although there were no injunctions against common-law judges, there is a common-law parallel to the § 1983 injunction at issue here in the collateral prospective relief available against judges through the use of the King's prerogative writs in England. The history of these writs discloses that the common-law rule of judicial immunity did not include immunity from prospective collateral relief. Pp. 528–536.

(b) The history of judicial immunity in the United States is fully consistent with the common-law experience. There never has been a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence. Limitations on obtaining equitable relief serve to curtail or prevent harassment of judges through suits against them by disgruntled litigants. Collateral injunctive relief against a judge, particularly when that relief is available through § 1983, also raises a concern relating to the proper functioning of federal-state relations, but that

concern has been addressed directly as a matter of comity and federalism, independent of principles of judicial immunity. While there is a need for restraint by federal courts called upon to enjoin actions of state judicial officers, there is no support for a conclusion that Congress intended to limit the injunctive relief available under § 1983 in a way that would prevent federal injunctive relief against a state judge. Rather, Congress intended § 1983 to be an independent protection for federal rights, and there is nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. Pp. 536–543.

2. Judicial immunity is no bar to the award of attorney's fees under the Civil Rights Attorney's Fees Awards Act. Congress has made clear in the Act its intent that attorney's fees be available in any action to enforce § 1983. And the legislative history confirms Congress' intent that an attorney's fee award be made available even when damages would be barred or limited by immunity doctrines. Pp. 543–544.

690 F. 2d 376, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 544.

Gerald L. Baliles, Attorney General of Virginia, argued the cause for petitioner. With him on the briefs were *William G. Broaddus*, Chief Deputy Attorney General, *Donald C. J. Gehring* and *Elizabeth B. Lacy*, Deputy Attorneys General, and *Jerry P. Slonaker*, Assistant Attorney General.

Deborah Chasen Wyatt argued the cause for respondents. With her on the brief was *John Calvin Jeffries, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, *Kent G. Harbison*, Chief Deputy Attorney General, *Douglas C. Blomgren* and *D. Douglas Blanke*, Special Assistant Attorneys General, and the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Norman C. Gorsuch* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *John Van de Kamp* of California, *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Charles M. Oberly III* of Delaware, *Jim Smith* of Florida, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*,

JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises issues concerning the scope of judicial immunity from a civil suit that seeks injunctive and declaratory relief under § 1 of the Civil Rights Act of 1871, as amended, 42 U. S. C. § 1983, and from fee awards made under the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U. S. C. § 1988.

Petitioner Gladys Pulliam is a state Magistrate in Culpeper County, Va. Respondents Richmond R. Allen and Jesse W. Nicholson were plaintiffs in a § 1983 action against Pulliam brought in the United States District Court for the Eastern District of Virginia. They claimed that Magistrate Pulliam's practice of imposing bail on persons arrested for nonjailable

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of Louisiana, *James E. Tierney* of Maine, *Stephan H. Sachs* of Maryland, *Francis X. Bellotti* of Massachusetts, *Frank J. Kelley* of Michigan, *William A. Allain* of Mississippi, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Brian McKay* of Nevada, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Robert Abrams* of New York, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Michael C. Turpen* of Oklahoma, *David Frohnmayer* of Oregon, *Leroy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.*, of Tennessee, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning, Jr.*, of West Virginia, *Bronson C. La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; for the American Bar Association by *Morris Harrell, W. Ervin James*, and *Phillip J. Roth;* for the Conference of Chief Justices by *Paul L. Friedman* and *Michael D. Sullivan;* for the Honorable Lawrence H. Cooke, Chief Judge of the State of New York, by *Paul A. Feigenbaum, Michael Colodner*, and *Kenneth Falk;* and for the Honorable Abraham J. Gafni, Court Administrator of Pennsylvania, by *Howland W. Abramson* and *Charles W. Johns.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Burt Neuborne* and *E. Richard Larson;* and for the National Association of Criminal Defense Lawyers by *J. Lloyd Snook III.*

offenses under Virginia law and of incarcerating those persons if they could not meet the bail was unconstitutional. The District Court agreed and enjoined the practice. That court also awarded respondents $7,691.09 in costs and attorney's fees under § 1988. The United States Court of Appeals for the Fourth Circuit rejected petitioner's claim that the award of attorney's fees against her should have been barred by principles of judicial immunity. We agree with the Court of Appeals and affirm the award.

I

Respondent Allen was arrested in January 1980 for allegedly using abusive and insulting language, a Class 3 misdemeanor under Va. Code § 18.2–416 (1982). The maximum penalty for a Class 3 misdemeanor is a $500 fine. See § 18.2–11(c). Petitioner set a bond of $250. Respondent Allen was unable to post the bond, and petitioner committed Allen to the Culpeper County jail, where he remained for 14 days. He was then tried, found guilty, fined, and released. The trial judge subsequently reopened the judgment and reversed the conviction. Allen then filed his § 1983 claim, seeking declaratory and injunctive relief against petitioner's practice of incarcerating persons waiting trial for nonincarcerable offenses.[1]

Respondent Nicholson was incarcerated four times within the 2-month period immediately before and after the filing of Allen's complaint. His arrests were for alleged violations of Va. Code § 18.2–388 (1982), being drunk in public. Section 18.2–388 is a Class 4 misdemeanor for which the maximum penalty is a $100 fine. See § 18.2–11(d). Like Allen, respondent Nicholson was incarcerated for periods of two to six

[1] Respondent Allen also challenged the failure of the trial judge to provide a first appearance, to appoint counsel, and to advise Allen of his rights during incarceration. The District Court dismissed the claim against the trial judge because "he played no direct role in the pretrial detention of either plaintiff." App. 31–32.

days for failure to post bond. He intervened in Allen's suit as a party plaintiff.

The District Court found it to be petitioner's practice to require bond for nonincarcerable offenses. The court declared the practice to be a violation of due process and equal protection and enjoined it.[2] The court also found that respondents, having substantially prevailed on their claims, were entitled to costs, including reasonable attorney's fees, in accordance with § 1988. It directed respondents to submit a request for costs to petitioner within 10 days. App. 23. Petitioner did not appeal this order.

Respondents submitted a request for fees and costs totalling $7,691.09. The fee component of this figure was $7,038.

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[2] Respondents had challenged both the constitutionality of the Virginia pretrial detention statute and petitioner's practice of imposing bail for nonincarcerable offenses. Virginia Code § 19.2–74.1 (later repealed by 1981 Va. Acts, ch. 382) prohibited the retention in custody of any person arrested for a misdemeanor for which he could not receive a jail sentence. The statute contained an exception for those persons arrested for profane swearing or being drunk in public, in violation of § 18.2–388. See 1980 Va. Acts, ch. 344. Section 19.2–74.A.1, however, authorized pretrial detention of any such person "believed by the arresting officer to be likely to disregard a summons" or "reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person."

The District Court declared both § 19.2–74 and § 19.2–74.1 unconstitutional "[t]o the extent that [they] authorize the incarceration of persons charged with misdemeanors for which no jail time is authorized, solely because they cannot meet bond." App. 22. It enjoined petitioner from "[t]he practice and course of conduct in Culpeper County, Virginia, under which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond." *Id.*, at 23.

Although the District Court concluded that respondents had been held in jail "solely because of their inability to make bail," *id.*, at 26, it also directed that "[a]ny pretrial detention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or to others may last only so long as such danger persists and must cease when the condition which created the danger changes or abates, or arrangements are made for release of the person into third-party custody under circumstances which abate the danger." *Id.*, at 22.

Petitioner filed objections and prayed "that the Court reduce the request of Plaintiffs for attorney's fees." *Id.*, at 33. The court found the fees figure reasonable and granted fees and costs in the requested amount.

Petitioner took an appeal from the order awarding attorney's fees against her. She argued that, as a judicial officer, she was absolutely immune from an award of attorney's fees. The Court of Appeals reviewed the language and legislative history of § 1988. It concluded that a judicial officer is not immune from an award of attorney's fees in an action in which prospective relief properly is awarded against her. Since the court already had determined that judicial immunity did not extend to injunctive and declaratory relief under § 1983,[3] the court concluded that prospective relief properly had been awarded against petitioner. It therefore affirmed the award of attorney's fees. *Allen* v. *Burke*, 690 F. 2d 376 (1982).

II

We granted certiorari in this case, 461 U. S. 904 (1983), to determine, as petitioner phrased the question, "[w]hether Judicial Immunity Bars the Award of Attorney's Fees Pursuant to 42 U. S. C. § 1988 Against a Member of the Judiciary Acting in his Judicial Capacity." See the initial leaf of the petition for certiorari. As the Court of Appeals recognized, the answer to that question depends in part on whether judicial immunity bars an award of injunctive relief under § 1983. The legislative history of § 1988 clearly indicates that Congress intended to provide for attorney's fees in cases where relief properly is granted against officials who are immune from damages awards. H. R. Rep. No. 94–1558, p. 9 (1976).[4] There is no indication, however, that Congress

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[3] See *Timmerman* v. *Brown*, 528 F. 2d 811, 814 (1975), rev'd on other grounds *sub nom. Leeke* v. *Timmerman*, 454 U. S. 83 (1981).

[4] "[W]hile damages are theoretically available under the statutes covered by H. R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees

intended to provide for a fee award if the official was immune from the underlying relief on which the award was premised. See *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 738–739 (1980). Before addressing the specific provisions of § 1988, therefore, we turn to the more fundamental question, that is, whether a judicial officer acting in her judicial capacity should be immune from prospective injunctive relief.[5]

III

Although injunctive relief against a judge rarely is awarded, the United States Courts of Appeals that have faced the issue are in agreement that judicial immunity does not bar such relief.[6] This Court, however, has never decided the question.[7]

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to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H. R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." (Footnote omitted.)

[5] This Court's Rule 21.1(a) provides: "The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein." The question whether judicial immunity should have barred the injunctive relief awarded in this case is "fairly included" in the question presented.

[6] Although the Court in *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 735 (1980), did state that the Courts of Appeals appeared to be divided on the question, an examination of the recent pronouncements of those courts indicates that they are in agreement that judicial immunity is no bar to injunctive relief. See, *e. g.*, *In re Justices of Supreme Court of Puerto Rico*, 695 F. 2d 17 (CA1 1982); *Heimbach* v. *Lyons*, 597 F. 2d 344 (CA2 1979); *Timmerman* v. *Brown*, *supra*; *Slavin* v. *Curry*, 574 F. 2d 1256 (CA5), vacated as moot, 583 F. 2d 779 (1978); *WXYZ, Inc.* v. *Hand*, 658 F. 2d 420 (CA6 1981); *Harris* v. *Harvey*, 605 F. 2d 330 (CA7 1979), cert. denied, 445 U. S. 938 (1980); *Richardson* v. *Koshiba*, 693 F. 2d 911 (CA9 1982).

The Eighth Circuit at one time seems to have taken contradictory positions on whether judges are immune from declaratory and injunctive relief. Compare *Koen* v. *Long*, 428 F. 2d 876 (1970), aff'g 302 F. Supp. 1383, 1389

[Footnote 7 is on p. 529]

The starting point in our own analysis is the common law. Our cases have proceeded on the assumption that common-law principles of legislative and judicial immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so. See *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). Accordingly, the first and crucial question is whether the common law recognized judicial immunity from prospective collateral relief.

At the common law itself, there was no such thing as an injunction against a judge. Injunctive relief was an equitable remedy that could be awarded by the Chancellor only against the parties in proceedings before other courts. See 2 J. Story, Equity Jurisprudence ¶875, p. 72 (11th ed. 1873). This limitation on the use of the injunction, however, says nothing about the scope of judicial immunity. And the limitation derived not from judicial immunity, but from the substantive confines of the Chancellor's authority. *Ibid.*

Although there were no injunctions against common-law judges, there is a common-law parallel to the § 1983 injunction at issue here. That parallel is found in the collateral prospective relief available against judges through the use of the King's prerogative writs. A brief excursion into common-law history helps to explain the relevance of these writs to the question whether principles of common-law immunity bar injunctive relief against a judicial officer.

(ED Mo. 1969) (no immunity), cert. denied, 401 U. S. 923 (1971), with *Smallwood* v. *United States*, 486 F. 2d 1407 (1973), aff'g without opinion, 358 F. Supp. 398, 403 (ED Mo.) (immunity), and *Tate* v. *Arnold*, 223 F. 2d 782, 786 (1955) (same). That court indicated in 1975, however, that "[t]his circuit has never decided whether those enjoying judicial immunity from damage suits are similarly immune from suits seeking equitable and injunctive relief," see *Bonner* v. *Circuit Court of St. Louis, Missouri*, 526 F. 2d 1331, 1334, and it now expressly has declined to do so. See *R. W. T.* v. *Dalton*, 712 F. 2d 1225, 1232, n. 9 (1983).

[7] See *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S., at 735, and n. 14.

The doctrine of judicial immunity and the limitations on prospective collateral relief with which we are concerned have related histories. Both can be traced to the successful efforts of the King's Bench to ensure the supremacy of the common-law courts over their 17th- and 18th-century rivals. See 5 W. Holdsworth, A History of English Law 159–160 (3d ed. 1945) (Holdsworth).

A number of courts challenged the King's Bench for authority in those days. Among these were the Council, the Star Chamber, the Chancery, the Admiralty, and the ecclesiastical courts. *Ibid.* In an effort to assert the supremacy of the common-law courts, Lord Coke forbade the interference by courts of equity with matters properly triable at common law. See *Heath* v. *Rydley*, Cro. Jac. 335, 79 Eng. Rep. 286 (K. B. 1614). Earlier, in *Floyd and Barker*, 12 Co. Rep. 23, 77 Eng. Rep. 1305 (1607), Coke and his colleagues of the Star Chamber had declared the judges of the King's Bench immune from prosecution in competing courts for their judicial acts. In doing so, they announced the theory upon which the concept of judicial immunity was built. The judge involved in *Floyd and Barker* was a common-law Judge of Assize who had presided over a murder trial. He was then charged in the Star Chamber with conspiracy. The court concluded that the judges of the common law should not be called to account "before any other Judge at the suit of the King." *Id.*, at 24, 77 Eng. Rep., at 1307.

> "[A]nd it was agreed, that insomuch as the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; for they

> are only to make an account to God and the King, and not to answer to any suggestion in the Star-Chamber." *Id.*, at 25, 77 Eng. Rep., at 1307.

As this quoted language illustrates, Coke's principle of immunity extended only to the higher judges of the King's courts. See 5 Holdsworth, at 159–160. In time, Coke's theory was expanded beyond his narrow concern of protecting the common-law judges from their rival courts, so that judges of all courts were accorded immunity, at least for actions within their jurisdiction.[8] See *Scott* v. *Stansfield*, 3 L. R. Ex. 220 (1868) (immunity extended to a county court, an inferior court of record; reliance placed on precedent extending immunity to the court of a coroner and to a court-martial, an inferior court and a court not of record); *Haggard* v. *Pelicier Frères* [1892] A. C. 61 (1891) (judge of Consular Court of Madagascar given same immunity as judge of a court of record). In addition, the theory itself was refined, its focus shifting from the need to preserve the King's authority to the public interest in independent judicial decisionmaking. See *Taaffe* v. *Downes*, reprinted in footnote in *Calder* v. *Halket*, 13 Eng. Rep. 12, 18, n. *(a)* (P. C. 1840) ("An action before one Judge for what is done by another, is in the nature of an Appeal; and is the Appeal from an equal to an equal. It is a solecism in the law . . . that the Plaintiff's case is against the independence of the Judges").

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[8] See Feinman & Cohen, Suing Judges: History and Theory, 31 S. C. L. Rev. 201, 211 (1980). As will be demonstrated, it was not always easy to determine what actions were within a court's jurisdiction. A similar limitation was imposed on the King's authority to control the judge by use of the prerogative writs. It appears, however, that the jurisdictional limit was taken more seriously—offering the judge more protection—when the issue was personal liability for an erroneous judicial action than when the question involved the reach of the prerogative writs. Compare *Gwinne* v. *Poole*, 2 Lut. 935, 125 Eng. Rep. 522 (C. P. 1692), with *Gould* v. *Gapper*, 5 East. 345, 102 Eng. Rep. 1102 (K. B. 1804).

By 1868, one of the judges of the Court of Exchequer explained judicial immunity in language close to our contemporary understanding of the doctrine:

> "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." *Scott* v. *Stansfield*, 3 L. R. Ex., at 223, quoted in *Bradley* v. *Fisher*, 13 Wall. 335, 350, n. (1872).

It is in the light of the common law's focus on judicial independence that the collateral control exercised by the King's Bench over rival and inferior courts has particular significance.

The King's Bench exercised significant collateral control over inferior and rival courts through the use of prerogative writs. The writs included habeas corpus, certiorari, prohibition, mandamus, quo warranto, and *ne exeat regno*. 1 Holdsworth, at 226–231 (7th ed. 1956). Most interesting for our current purposes are the writs of prohibition and mandamus.[9] The writs issued against a judge, in theory to pre-

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[9] The writ of prohibition appears to have been used more than the writ of mandamus to control inferior courts. Mandamus could issue to any person in respect of anything that pertained to his office and was in the nature of a public duty. See 1 Halsbury's Laws of England ¶ 81 (4th ed. 1973). The other prerogative writs are also of some relevance here. The writ of certiorari, for instance, issued to remove proceedings from an inferior tribunal to ensure that the court was keeping within its jurisdiction and effectuating the rules of the common law. Once a writ of certiorari was delivered to a judge, he was forbidden to proceed further in the case. Failure to suspend proceedings amounted to a contempt. See R. Pound, Appellate Procedure in Civil Cases 61 (1941).

vent him from exceeding his jurisdiction or to require him to exercise it. *Id.*, at 228–229. In practice, controlling an inferior court in the proper exercise of its jurisdiction meant that the King's Bench used and continues to use the writs to prevent a judge from committing all manner of errors, including departing from the rules of natural justice, proceeding with a suit in which he has an interest, misconstruing substantive law, and rejecting legal evidence. See 1 Halsbury's Laws of England ¶¶76, 81, 130 (4th ed. 1973); Gordon, The Observance of Law as a Condition of Jurisdiction, 47 L. Q. Rev. 386, 394 (1931).[10]

Examples are numerous in which a judge of the King's Bench, by issuing a writ of prohibition at the request of a party before an inferior or rival court, enjoined that court from proceeding with a trial or from committing a perceived error during the course of that trial. See generally Dobbs, The Decline of Jurisdiction by Consent, 40 N. C. L. Rev. 49, 60–61 (1961). The writs were particularly useful in exercising collateral control over the ecclesiastical courts, since the King's Bench exercised no direct review over those tribunals. In *Shatter* v. *Friend*, 1 Show. 158, 89 Eng. Rep. 510 (K. B. 1691), for example, the court granted a prohibition against the Spiritual Court for refusing to allow the defendant's proof of payment of a 10-pound legacy, one of the justices concluding that "it was an unconscionable unreasonable thing to disallow the proof." *Id.*, at 161, 89 Eng. Rep., at 512.[11]

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[10] Gordon observes that the fiction that misconstruction of substantive law constitutes action in excess of jurisdiction has been abandoned, and the textbooks now show disregard of a statute as a ground for prohibition distinct from want or excess of jurisdiction. Gordon, 47 L. Q. Rev., at 394.

[11] In *Harrison* v. *Burwell*, 2 Vent. 9, 86 Eng. Rep. 278 (K. B. 1670), the King's Bench granted a writ of prohibition against the Spiritual Court that had declared void as incestuous a marriage between a man and the woman who had been married to his great uncle. The court concluded that the Spiritual Court had misinterpreted the marriage as barred by the Levitical decree and that it had no jurisdiction to declare void a marriage not barred by that decree. See also *Serjeant* v. *Dale*, 2 Q. B. D. 558 (1877) (prohi-

In *Gould* v. *Gapper*, 5 East. 345, 102 Eng. Rep. 1102 (K. B. 1804), the court made explicit what had been implicit in a number of earlier decisions. It held that a writ of prohibition would be granted not only when a court had exceeded its jurisdiction, but also when the court, either a noncommon-law court or an inferior common-law court, had misconstrued an Act of Parliament or, acting under the rules of the civil law, had decided otherwise than the courts of common law would upon the same subject. The fact that the error might be corrected on appeal was deemed to be irrelevant to the availability of a writ of prohibition. In the court's view, the reason for prohibition in such a case was "[n]ot that the Spiritual Court had not jurisdiction to construe [the statute], but that the mischiefs of misconstruction were to be prevented by prohibition." *Id.*, at 368, 102 Eng. Rep., at 1111.[12]

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bition to the Court of Arches issued to prevent a bishop from hearing a case in which he had an interest); *White* v. *Steele*, 12 Scott N. R. 383, 12 C. B. 383 (1862) (writ of prohibition issued to a Judge of the Arches Court of Canterbury until he allowed the introduction of evidence the common law required to be admitted).

Similar use of the writ can be found in more recent cases. In *King* v. *North*, [1927] 1 K. B. 491 (1926), a vicar had been ordered by the Consistory Court to pay for the restoration of a fresco he was alleged to have caused to be painted over. He sought a writ of prohibition, claiming that he had had no notice or opportunity to be heard. The court concluded that deprivation of property without notice and an opportunity to be heard was contrary to the general laws of the land, and granted the prohibition.

[12] The court in *Gould* quoted from Blackstone, who described the use of the writ of prohibition as follows:

"This writ may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises; to the county-courts or courts baron, where they attempt to hold plea of any matter of the value of forty shillings: or it may be directed to the courts christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction: as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or, if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they re-

Although the King's Bench exercised direct review of the inferior common-law courts, it also used the writ of prohibition to control those courts. See, *e. g.*, *In re Hill*, 10 Exch. 726 (1855) (prohibition issued to prevent judge from proceeding in a case in which he, of his own accord, had amended a claim to an amount within his jurisdiction).[13]

The practice has continued into modern times. In *King* v. *Emerson*, [1913] 2 Ir. R. 377, for instance, the court granted a writ of prohibition preventing a justice of the peace, acting in a judicial capacity, from proceeding with a deposition, because of a likelihood that a reasonable public might conclude that the magistrate's statements indicated bias in favor of the Crown. The court directed the magistrate to pay costs to the complaining party, leaving him to settle with the Crown the matter of indemnification.

The relationship between the King's Bench and its collateral and inferior courts is not precisely paralleled in our system by the relationship between the state and federal courts.

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quire two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety, which no wise government can or ought to endure, and which is therefore a ground of prohibition. And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured in damages." 3 W. Blackstone, Commentaries *112–*113 (footnotes omitted).

[13] See also *Queen* v. *Adamson*, 1 Q. B. D. 201 (1875) (mandamus issued to require justices of the peace to hear applications for a summons to answer a charge of conspiracy to do grievous harm, where refusal had been based on distaste for the applicants' views); *Queen* v. *Marsham*, [1892] 1 Q. B. 371 (1891) (mandamus issued to require a magistrate to hear legal evidence).

To the extent that we rely on the common-law practice in shaping our own doctrine of judicial immunity, however, the control exercised by the King's Bench through the prerogative writs is highly relevant. It indicates that, at least in the view of the common law, there was no inconsistency between a principle of immunity that protected judicial authority from "a wide, wasting, and harassing persecution," *Taaffe* v. *Downes*, 13 Eng. Rep., at 18, n. *(a)*, and the availability of collateral injunctive relief in exceptional cases. Nor, as indicated above, did the common law deem it necessary to limit this collateral relief to situations where no alternative avenue of review was available. See *Gould* v. *Gapper*, *supra*.

It is true that the King's Bench was successful in insulating its judges from collateral review. But that success had less to do with the doctrine of judicial immunity than with the fact that only the superior judges of the King's Bench, not the ecclesiastical courts or the inferior common-law courts, had authority to issue the prerogative writs.[14]

IV

Our own experience is fully consistent with the common law's rejection of a rule of judicial immunity from prospective relief. We never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence. None of the seminal opinions on judicial immunity, either in England or in this country, has involved

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[14] Blackstone indicates that a writ of prohibition properly issued "only out of the court of king's bench, being the king's prerogative writ; but for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties, of a suit in any inferior court, commanding them to cease from the prosecution thereof." 3 W. Blackstone, Commentaries *112 (footnotes omitted). The significant point is that the ecclesiastical and inferior courts could not retaliate against the King's Bench by use of the writ.

immunity from injunctive relief.[15] No Court of Appeals ever has concluded that immunity bars injunctive relief against a judge. See n. 6, *supra*. At least seven Circuits have indicated affirmatively that there is no immunity bar to such relief, and in situations where in their judgment an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted that relief.[16]

For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards. The limitations already imposed by the requirements for obtaining equitable relief against any defendant—a showing of an inadequate remedy at law and of a serious risk of irreparable harm, see *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 506–507 (1959)[17]—severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to

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[15] See, *e. g.*, *Floyd and Barker*, 12 Co. Rep. 23, 77 Eng. Rep. 1305 (K. B. 1607) (criminal prosecution for conspiracy); *Taaffe* v. *Downes*, reprinted in footnote in *Calder* v. *Halket*, 13 Eng. Rep. 12, 15, n. *(a)* (P. C. 1840) (damages for assault and false imprisonment); *Scott* v. *Stansfield*, 3 L. R. Ex. 220 (1868) (damages for slander); *Randall* v. *Brigham*, 7 Wall. 523 (1869) (damages for removing an attorney from the bar); *Bradley* v. *Fisher*, 13 Wall. 335 (1872) (damages for improperly removing the plaintiff from the rolls of court); *Pierson* v. *Ray*, 386 U. S. 547 (1967) (damages for false conviction); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (damages resulting from the judge's order that the plaintiff be sterilized).

[16] See, *e. g.*, *United States* v. *McLeod*, 385 F. 2d 734 (CA5 1967) (injunction to protect Negroes who attempted to register to vote from harassing actions by state officials, including a judge); *Fernandez* v. *Trias Monge*, 586 F. 2d 848 (CA1 1978) (injunction against unconstitutional pretrial detention procedure); *WXYZ, Inc.* v. *Hand*, 658 F. 2d 420 (CA6 1981) (injunction against enforcement of a court's "gag" order, when the court had threatened violators with contempt).

[17] When the question is whether a federal court should enjoin a pending state-court proceeding, "even irreparable injury is insufficient unless it is 'both great and immediate.'" *Younger* v. *Harris*, 401 U. S. 37, 46 (1971), quoting *Fenner* v. *Boykin*, 271 U. S. 240, 243–244 (1926). See discussion at n. 19, *infra*.

defend themselves against suits by disgruntled litigants.[18] Similar limitations serve to prevent harassment of judges through use of the writ of mandamus. Because mandamus has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him," the Court has stressed that it should be "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 260 (1947). Occasionally, however, there are "really extraordinary causes" and, in such cases, there has been no suggestion that judicial immunity prevents the supervising court from issuing the writ.[19]

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[18] Article III also imposes limitations on the availablity of injunctive relief against a judge. See *In re Justices of Supreme Court of Puerto Rico*, 695 F. 2d 17, 21 (CA1 1982) (no case or controversy between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute). See also *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983) (claims for injunctive relief against unconstitutional state practice too speculative).

[19] In *Hall* v. *West*, 335 F. 2d 481 (CA5 1964), a petition for writ of mandamus was filed by Negro plaintiffs in a civil rights case that had been pending before the District Court more than 11 years. Although two other District Courts, affirmed by this Court, had declared unconstitutional the Louisiana segregated school system and the state statute passed to allow the school board to close public schools to avoid desegregation, the board had made clear that it intended to take no action to change the segregated system without a further order from the District Court. The court, however, refused to act. The Court of Appeals therefore issued a writ of mandamus, compelling the District Court to order the defendants to submit a plan for the commencement of desegregation of the schools under their control. See also *In re Attorney General of the United States*, 596 F. 2d 58 (CA2) (writ of mandamus granted to vacate District Court's contempt order against the Attorney General), cert. denied, 444 U. S. 903 (1979).

Whether or not the judge is required to appear personally in the proceeding, see the dissent, *post*, at 552, he remains a party to the suit and risks contempt for violating the writ. See *In re Smith*, 2 Cal. App. 158, 83 P. 167 (1905); *State* v. *Williams*, 7 Rob. 252 (La. 1844); *People ex rel. Bristol* v. *Pearson*, 4 Ill. 270 (1841). And although courts properly are reluctant to impose costs against a judge for actions taken in good-faith performance of his judicial responsibilities, a court, in its discretion, may award costs against a respondent judge. See *State ex rel. Clement* v. *Grzezinski*, 158 Ohio St. 22, 106 N. E. 2d 779 (1952).

The other concern raised by collateral injunctive relief against a judge, particularly when that injunctive relief is available through § 1983, relates to the proper functioning of federal-state relations. Federal judges, it is urged, should not sit in constant supervision of the actions of state judicial officers, whatever the scope of authority under § 1983 for issuing an injunction against a judge.

The answer to this concern is that it is not one primarily of judicial independence, properly addressed by a doctrine of judicial immunity. The intrusion into the state process would result whether the action enjoined were that of a state judge or of another state official. The concern, therefore, has been addressed as a matter of comity and federalism, independent of principles of judicial immunity.[20] We reaffirm the validity of those principles and the need for restraint by federal courts called on to enjoin the actions of state judicial officers. We simply see no need to reinterpret the principles now as stemming from the doctrine of judicial immunity.

If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm. Absent some basis for determining that such a result is compelled, either by the principles of judicial immunity, derived from the common law and not explicitly abrogated by Congress, or by Congress' own intent to limit

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[20] See *O'Shea* v. *Littleton*, 414 U. S. 488 (1974) (rejecting, on Art. III and *Younger* v. *Harris* grounds, an injunction issued against state judicial officials, although the Court of Appeals, see *Littleton* v. *Berbling*, 468 F. 2d 389 (CA7 1972), had devoted the bulk of its opinion to judicial immunity). A state judge was among the defendants in *Mitchum* v. *Foster*, 407 U. S. 225 (1972), where the Court recognized § 1983 as an explicit exception to the anti-injunction statute, but reaffirmed "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id.*, at 243.

the relief available under § 1983, we are unwilling to impose those limits ourselves on the remedy Congress provided.

As illustrated above, there is little support in the common law for a rule of judicial immunity that prevents injunctive relief against a judge. There is even less support for a conclusion that Congress intended to limit the injunctive relief available under § 1983 in a way that would prevent federal injunctive relief against a state judge. In *Pierson* v. *Ray*, 386 U. S. 547 (1967), the Court found no indication of affirmative congressional intent to insulate judges from the reach of the remedy Congress provided in § 1983. The Court simply declined to impute to Congress the intent to abrogate common-law principles of judicial immunity. Absent the presumption of immunity on which *Pierson* was based, nothing in the legislative history of § 1983 or in this Court's subsequent interpretations of that statute supports a conclusion that Congress intended to insulate judges from prospective collateral injunctive relief.

Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1866, 14 Stat. 27, to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum* v. *Foster*, 407 U. S. 225, 240 (1972). See also *Pierson* v. *Ray*, 386 U. S., at 558–564 (dissenting opinion) (every Member of Congress who spoke to the issue assumed that judges would be liable under § 1983).

Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges. In *Ex parte Virginia*, 100 U. S. 339 (1880), § 4 of the Civil Rights Act of 1875, 18 Stat. 336, was employed to authorize a criminal indictment against a judge for excluding persons from

jury service on account of their race. The Court reasoned that the Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the equal protection of the laws. Since a State acts only by its legislative, executive, or judicial authorities, the constitutional provision must be addressed to those authorities, including the State's judges. Section 4 was an exercise of Congress' authority to enforce the provisions of the Fourteenth Amendment and, like the Amendment, reached unconstitutional state judicial action.[21]

The interpretation in *Ex parte Virginia* of Congress' intent in enacting the Civil Rights Acts has not lost its force with the passage of time. In *Mitchum* v. *Foster*, *supra*, the Court found § 1983 to be an explicit exception to the anti-injunction statute, citing *Ex parte Virginia* for the proposition that the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" 407 U. S., at 242.

Much has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation. We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review.

We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her

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[21] The Court assumed that the judge was performing a ministerial rather than a judicial function. It went on to conclude, however, that even if the judge had been performing a judicial function, he would be liable under the statute. 100 U. S., at 348–349.

judicial capacity. In so concluding, we express no opinion as to the propriety of the injunctive relief awarded in this case. Petitioner did not appeal the award of injunctive relief against her. The Court of Appeals therefore had no opportunity to consider whether respondents had an adequate remedy at law, rendering equitable relief inappropriate,[22] or

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[22] *O'Shea* v. *Littleton*, 414 U. S., at 502. Virginia provides, for instance, for appellate review of orders denying bail or requiring excessive bail, see Va. Code § 19.2–124 (1983), and for state habeas corpus relief from unlawful detention, see Va. Code § 8.01–654 (Supp. 1983). On the other hand, the nature and short duration of the pretrial detention imposed by petitioner was such that it may have been impossible for respondents to avail themselves of these remedies. Cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975).

The fact that "[t]here has been no showing to this effect," *post*, at 554, n. 13, is hardly a sufficient basis for rejecting the relief awarded here or for questioning the effectiveness of the limitations on equitable relief in curtailing the risk of harassment from suits for such relief. What the dissenters ignore is that petitioner did not challenge the relief awarded against her. "There has been no showing" because respondents never have been called on to make such a showing.

For similar reasons, there is no merit to the dissenters' insistence that the scope of the injunctive order entered here illustrates the threat to judicial independence inherent in allowing injunctive relief against judges. See *post*, at 554–555. In the first place, the dissenters' interpretation of the District Court's order is by no means compelled by the language of that order. The order merely declared the constitutional limits on pretrial detention for dangerousness. There was no suggestion before the District Court that petitioner had misapplied the provision for pretrial detention for dangerousness. Accordingly, petitioner was enjoined only from the "practice and course of conduct in Culpeper County, Virginia, under which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond." App. to Pet. for Cert. 11. No judgment calls are required in following the court's order that petitioner no longer impose bond for offenses for which no incarceration is authorized by statute. More important, to the extent that the scope of the District Court's order may be unclear, that issue should have been raised by appeal from the injunctive relief, where, had petitioner demonstrated that the injunctive relief ordered against her was too intrusive, the Court of Appeals no doubt would have ordered the District Court to tailor its relief more narrowly. See *O'Shea* v. *Littleton*, *supra*.

whether the order itself should have been more narrowly tailored. On the record before us and without the benefit of the Court of Appeals' assessment, we are unwilling to speculate about these possibilities. We proceed, therefore, to the question whether judicial immunity bars an award of attorney's fees, under § 1988, to one who succeeds in obtaining injunctive relief against a judicial officer.

V

Petitioner insists that judicial immunity bars a fee award because attorney's fees are the functional equivalent of monetary damages and monetary damages indisputably are prohibited by judicial immunity. She reasons that the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees.

There is, perhaps, some logic to petitioner's reasoning.

The weakness in it is that it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity. See *Pierson* v. *Ray*, 386 U. S., at 554. Congress has made clear in § 1988 its intent that attorney's fees be available in any action to enforce a provision of § 1983. See also *Hutto* v. *Finney*, 437 U. S. 678, 694 (1978). The legislative history of the statute confirms Congress' intent that an attorney's fee award be available even when damages would be barred or limited by "immunity doctrines and special defenses, available only to public officials." H. R. Rep. No. 94–1558, p. 9 (1976).[23] See also

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[23] As further indication of Congress' intent that § 1988 apply to judicial officers, the House Report contains a citation to *Pierson* v. *Ray*, 386 U. S. 547 (1967). Petitioner suggests that the citation to *Pierson* refers to another aspect of the decision, regarding qualified immunities of officials in the Executive Branch. We see no need to adopt such a strained interpretation. The House Report clearly referred to public officials against whom damages were *precluded*, as well as those against whom damages were limited. Of the three cases cited by the House Report, only *Pierson* involved complete preclusion of a damages award.

Supreme Court of Virginia v. *Consumers Union of United States, Inc.*, 446 U. S., at 738–739 ("The House Committee Report on [§ 1988] indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards").

Congress' intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U. S. C. § 1988.

The judgment of the Court of Appeals, allowing the award of attorney's fees against petitioner, is therefore affirmed.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today reaffirms the rule that judges are immune from suits for damages, but holds that they may be sued for injunctive and declaratory relief and held personally liable for money judgments in the form of costs and attorney's fees merely on the basis of erroneous judicial decisions. The basis for the Court's distinction finds no support in common law and in effect eviscerates the doctrine of judicial immunity that the common law so long has accepted as absolute.

The Court recognizes that the established principle of judicial immunity serves as the bulwark against threats to "independent judicial decisionmaking," *ante*, at 531. Yet, at the same time it concludes that judicial immunity does not bar suits for injunctive or declaratory relief with the attendant claims for costs and attorney's fees. The Court reasons that "[f]or the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards." *Ante*, at 537. This case illustrates the unsoundness of that reasoning. The Court affirms a $7,691.09 money judgment awarded against a state Magistrate on the determination that she made erroneous judicial decisions with respect to bail and pretrial detentions. Such a

judgment poses the same threat to independent judicial decisionmaking whether it be labeled "damages" of $7,691.09 or "attorney's fees" in that amount. Moreover, as was held a century and a half ago, an "action before one Judge for what is done by another . . . [is a] case . . . against the independence of the Judges." *Taaffe* v. *Downes*, reprinted in footnote in *Calder* v. *Halket*, 13 Eng. Rep. 12, 18, n. *(a)* (P. C. 1840). The burdens of having to defend such a suit are identical in character and degree, whether the suit be for damages or prospective relief. The holding of the Court today subordinates realities to labels. The rationale of the common-law immunity cases refutes the distinction drawn by the Court.

I

Since 1869, this Court consistently has held that judges are absolutely immune from civil suits for damages. See, *e. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Bradley* v. *Fisher*, 13 Wall. 335 (1872); *Randall* v. *Brigham*, 7 Wall. 523 (1869). We have had no occasion, however, to determine whether judicial immunity bars a § 1983 suit for prospective relief. See *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 735 (1980).[1] It is clear that Congress did not limit the

[1] Respondents' argument that this Court has "at least implied that judicial immunity did not bar [declaratory or injunctive] relief" misreads the precedents. Brief for Respondents 12. Respondents rely on the cases cited in note 14 of the Court's opinion in *Consumers Union*, 446 U. S., at 735. None of those cases addressed the issue of judicial immunity from prospective relief. In *Mitchum* v. *Foster*, 407 U. S. 225 (1972), appellant filed a § 1983 claim against state judicial and law enforcement officials seeking to enjoin state-court proceedings under an allegedly unconstitutional state law. The only issue considered by this Court was whether § 1983 was an authorized exception to the anti-injunction statute that allowed federal courts to enjoin state-court proceedings. In *Boyle* v. *Landry*, 401 U. S. 77 (1971), appellees filed a § 1983 claim against state judicial and law enforcement officials seeking to enjoin the enforcement of state statutes on the ground that such enforcement was used to harass and deter appellees from exercising their constitutional rights. This Court found that appel-

scope of common-law immunities in either § 1983[2] or § 1988.[3] We, therefore, have looked to the common law to determine when absolute immunity should be available. A review of the common law reveals nothing that suggests—much less requires—the distinction the Court draws today between suits for prospective relief (with the attendant liability for costs and attorney's fees) and suits for damages.

The doctrine of judicial immunity is one of the earliest products of the English common law.[4] It was established to protect the finality of judgments from continual collateral attack in courts of competing jurisdiction[5] and to protect

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lees had not been threatened with prosecution and held that the lower court had lacked Art. III jurisdiction. The suit against judicial officials in *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), was dismissed on the same ground. Although the lower court in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), had ordered injunctive relief against judicial officers, only the state prosecutor sought review. Thus, the Court did not consider the propriety of the relief awarded against the judicial officers.

[2] See *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967).

[3] In *Consumers Union*, *supra*, at 738, the Court observed that "[t]here is no . . . indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." Similarly, there is no indication in the legislative history of the Act to suggest that Congress intended to diminish the scope of judicial immunity.

[4] The doctrine was recognized as early as the reign of Edward III (1327–1377). See 6 W. Holdsworth, A History of English Law 234–235 (2d ed. 1937).

[5] During the early medieval period, there was no such thing as an appeal from court to court. Judges were not immune from suits attacking their judicial acts, and the common procedure for challenging a judicial ruling was to file a complaint of "false judgment" against the judge. 1 W. Holdsworth, A History of English Law 213–214 (7th ed. 1956); 6 Holdsworth, at 235. At this time, the King's Bench was the central common-law court, and it vied for jurisdiction with the local feudal courts and the ecclesiastical courts. To protect the finality and authoritativeness of its decisions from collateral attack in these competing courts, the King's Bench borrowed the idea of appellate procedure from the ecclesiastical

judicial decisionmaking from intimidation and outside interference.[6] Gradually, the protection of judicial independence became its primary objective. The specific source of intimidation articulated by the English common-law cases was the threat of vexatious litigation should judges be required to defend their judicial acts in collateral civil proceedings. In *Taaffe* v. *Downes*, *supra*, at 18, n. *(a)*, the justices observed: "If you once break down the barrier . . . and subject [judges] to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution . . . ." The common-law cases made no reference to the effect on judicial independence of particular remedies such as an award of damages.

The early opinions of this Court echo the principal justification for the immunity doctrine articulated at English common law. In *Bradley* v. *Fisher*, *supra*, the emphasis was on the

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courts. R. Pound, Appellate Procedure in Civil Cases 25–26 (1941). To ensure this procedure, it was necessary to immunize the judicial acts of common-law judges from collateral attack—hence the doctrine of judicial immunity.

[6] Because the judge rather than the prevailing party to the original suit became the named defendant in a complaint for false imprisonment, it was the judge who suffered the burdens of litigation and the consequences of any adverse judgment. The burdens of litigation could be substantial. In the early days, the defendant judge was required, at his own expense, to prepare a record setting forth the proceedings upon which his challenged judicial decisions were made and to send four suitors of the court to bring the record before the King's Bench. *Id.*, at 26. If the judgment was found to be false, the judge was amerced or fined. 6 Holdsworth, at 235. The common law recognized that the threat of personal litigation would jeopardize the independence of judicial decisionmaking: judges, to avoid being called before a hostile tribunal to account for their judicial acts, could be deterred by personal considerations from judging dispassionately the merits of the cases before them. See *Taaffe* v. *Downes*, 13 Eng. Rep., at 23, n. *(a)* ("A Judge . . . ought to be uninfluenced by any personal consideration whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself").

burden of harassing and vexatious litigation. The Court observed:

> "If . . . a judge could be compelled to answer in a civil action for his judicial acts, . . . he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party . . . that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party." *Id.*, at 349.

Addressing the need for judicial independence, the Court therefore concluded:

> "'The public are deeply interested in th[e] rule [of judicial immunity], which . . . was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions.'" *Ibid.* (quoting *Fray* v. *Blackburn*, 3 B. & S. 576, 578, 122 Eng. Rep. 217 (1863)).

The justification for the immunity doctrine emphasized in *Bradley* has been repeated in subsequent decisions by this Court. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S., at 554; *Butz* v. *Economou*, 438 U. S. 478, 512 (1978). In these cases as well, the burdens of litigation, rather than the threat of pecuniary loss, are cited as posing a threat to judicial independence and occasioning the need for immunity. These burdens apply equally to all suits against judges for allegedly erroneous or malicious conduct. It is immaterial whether the relief sought is an injunction as in this case, or damages as in *Pierson* v. *Ray* or *Stump* v. *Sparkman*. Indeed, the Court today, largely ignoring that it was the burden of litigation that motivated the common-law immunity, makes no argument to the contrary. Unless the rationale of *Bradley* and

the common-law cases is rejected, judicial immunity from suits against judges for injunctive relief must be coextensive with immunity from suits for damages.

II

A

The Court nevertheless argues that the common law of England can be viewed as supporting the absence of immunity where the suit is for injunctive relief. The Court concedes, as it must, that suits for injunctive relief against a judge could not be maintained either at English common law or in the English courts of equity. *Ante*, at 529. Injunctive relief from inequitable proceedings at common law was available in equity "to stay [a common-law] trial; or, after verdict, to stay judgment; or, after judgment, to stay execution." J. Story, Equity Jurisprudence ¶874, p. 72 (11th ed. 1873). But such relief was available only against the parties to the common-law proceedings and not against the judge. *Id.*, ¶875, at 72. The suit for injunctive relief at issue here is precisely the type of suit that the Court concedes could not have been maintained either at common law or in equity. The Court, however, reasons that the writs of prohibition and mandamus present a "common-law parallel to the § 1983 injunction at issue here." *Ante*, at 529.

The prerogative writs of mandamus and prohibition are simply not analogous to suits for injunctive relief from the judgments of common-law courts, and the availability of these writs against judicial officials has nothing to do with judicial immunity. It has long been recognized at common law that judicial immunity protects only those acts committed within the proper scope of a judge's jurisdiction, but provides no protection for acts committed in excess of jurisidiction.[7]

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[7] See 6 Holdsworth, *supra* n. 4, at 236–237:

"[I]n *The Case of the Marshalsea*, 'a difference was taken when a court has jurisdiction of the cause, and proceeds . . . erroneously, there . . . no action lies [against a judge]. . . . But when the court has not jurisdiction of

Because writs of prohibition and mandamus were intended only to control the proper exercise of jurisdiction,[8] they posed no threat to judicial independence and implicated none of the policies of judicial immunity. Thus, the judges of England's inferior courts were subject to suit for writs of mandamus and prohibition, but judicial immunity barred all suits attacking judicial decisions made within the proper scope of their jurisdiction.[9] There is no allegation in this case that petitioner exceeded her jurisdiction. The suit for injunctive relief is based solely on an erroneous construction and application of law. It is precisely this kind of litigation that the common-law doctrine of judicial immunity was intended to prohibit.

B

The Court's observation that prerogative writs may have been used at English common law to correct errors of judgment rather than excesses of jurisdiction is irrelevant to the case at bar. We "rely on the common-law practice in shaping our own doctrine of judicial immunity," *ante*, at 536, only to the extent that the common-law practices consulted are consistent with our own judicial systems. The Court's reliance on English common-law practice ignores this constraint. It was the rivalry between the English temporal and spiritual courts that induced the King's Bench to adopt the myth that

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the cause, then the whole proceeding is *coram non judice*, and actions [against the judge] will lie'" (quoting *Case of the Marshalsea*, 10 Co. Rep. 68b, 76a, 77 Eng. Rep. 1027, 1038 (K. B. 1613)).

See also *Bradley* v. *Fisher*, 13 Wall. 335, 351–353 (1872).

[8] See 1 Holdsworth, *supra* n. 5, at 228–229.

[9] Holdsworth observed:

"'[I]t is agreed that the judges in the king's superior courts are not liable to answer personally for their errors in judgment. . . . [I]n courts of special and limited jurisdiction . . . a distinction must be made, but while acting within the line of their authority they are protected as to errors in judgment; otherwise they are not protected.'" 6 Holdsworth, *supra*, at 239, n. 4 (quoting *Miller* v. *Seare*, 2 Bl. W. 1141, 1145, 96 Eng. Rep. 673, 674–675 (K. B. 1777)).

misapplication of substantive common law affects the court's jurisdiction.[10] As the Court points out, the relationship between the King's Bench and its rival ecclesiastical courts finds no parallel in our judicial system. *Ante*, at 535. There is no indication that the courts of this country ever resorted to the fictional use of prerogative writs found at English common law. To the contrary, our courts expressly have rejected the fiction and have limited the use of mandamus and prohibition to jurisdictional issues or to cases where the court has a clear duty to act. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). See also *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 382–383 (1953); *Will* v. *United States*, 389 U. S. 90, 103–104 (1967).

Nor is there any indication that the expansive use of prerogative writs in England modified the doctrine of judicial immunity in this country.[11] Indeed, the sparing use of the

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[10] For example, the Court cites Gordon, The Observance of Law as a Condition of Jurisdiction, 47 L. Q. Rev. 386, 393 (1931), which provides: "The idea that to misapply or fail to apply substantive . . . law affects a judicial tribunal's jurisdiction, even when it acts within its province, is now generally recognized as wrong. That there was at one time doubt upon the point was due to the former hostility of the King's Bench toward . . . the ecclesiastical Courts. Although the King's Bench admitted it could not redress mere error in such Courts, it could, of course, restrain their excesses of jurisdiction through the writ of prohibition. And under the pretext that it was merely keeping them within their jurisdiction, it issued prohibitions to these Courts whenever they applied or construed any statute in a way the King's Bench did not approve of." (Footnotes omitted.) See also 3 W. Blackstone, Commentaries *113–*115; Dobbs, The Decline of Jurisdiction By Consent, 40 N. C. L. Rev. 49, 60–61 (1961).

[11] As early as the decision in *Bradley* v. *Fisher*, this Court drew a clear distinction between erroneous judicial acts committed within a judge's jurisdiction, for which there was absolute immunity, and acts committed in excess of jurisdiction, for which there was none. 13 Wall., at 351–353. This distinction, coupled with the principle that writs of mandamus and prohibition could issue only to correct clear jurisdictional errors, hardly suggests that the easy availability of prerogative writs against England's ecclesiastical courts limited the scope of judicial immunity in this country.

writs of prohibition and mandamus in American jurisprudence has been motivated in large part by the concern for judicial independence. Cases counseling restraint in the use of prerogative writs repeatedly have observed that such writs have "the unfortunate consequence" of "plac[ing] trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers." *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 258 (1957). See also *Kerr* v. *United States District Court*, 426 U. S. 394, 402 (1976); *Bankers Life & Casualty Co.*, *supra*, at 384–385; *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947). In response to this concern, the Federal Rules of Appellate Procedure have provided that the respondent judge in a proceeding for mandamus or prohibition may elect not to appear in the proceeding without conceding the issues raised in the petition. Fed. Rule App. Proc. 21(b).[12] Finally, courts consistently have held that concerns for judicial independence require that any award of costs to a prevailing party in an action for mandamus or prohibition be made only against the party at interest and not against the judge. The United States Court of Appeals for the First Circuit explained:

> "It would be contrary to the fundamental rules protecting the freedom of judicial action to tax costs against a judge of any one of the constitutional courts of the United States by reason of any failure to apprehend the

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[12] Rule 21(b) provides in relevant part:

"If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted."

Indeed, the Court of Appeals for the District of Columbia Circuit has not even required that the judge be joined as a party. In *United States* v. *King*, 157 U. S. App. D. C. 179, 183, 482 F. 2d 768, 772 (1973), the court reasoned: "In the federal courts, when the purpose of mandamus is to secure a ruling on the intrinsic merits of a judicial act, the judge need not—and desirably should not—be named as an active party, but at most only as a nominal party with no real interest in the outcome."

law correctly." *In re Haight & Freese Co.*, 164 F. 688, 690 (1908).

Accord, *Cotler* v. *Inter-County Orthopaedic Assn.*, 530 F. 2d 536, 538 (CA3 1976).

In sum, the perceived analogy to the use of prerogative writs at English common law simply does not withstand analysis. As shown above, the analogy rests on a peculiar practice at English common law that was occasioned by the unique relationship between the King's Bench and England's ecclesiastical courts. That relationship finds no parallel in this country. Moreover, our courts, and the Federal Rules of Appellate Procedure, have sought to limit the use of mandamus and prohibition for the very purpose of protecting judicial immunity. It is extraordinary, therefore, that the Court today should rely on the use of prerogative writs in England to justify exposing judicial officials in this country to harassing litigation and to subject them to personal liability for money judgments in the form of costs and attorney's fees.

III

The Court suggests that the availability of injunctive relief under § 1983 poses no serious "risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants." *Ante*, at 537–538. The reasons advanced for this optimism are that equitable relief will be unavailable unless the plaintiff can show "an inadequate remedy at law and . . . a serious risk of irreparable harm." *Ibid.* Again, this suit refutes the Court's argument. Adequate remedies were expressly available to each of the respondents under state law.[13]

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[13] The Court says that "it may have been impossible for respondents to avail themselves" of other remedies provided by Virginia law. *Ante*, at 542, n. 22. Virginia law, however, provides two specific remedies for alleged unlawful detention. Virginia Code § 8.01–654 (Supp. 1983) provides that a "writ of habeas corpus . . . shall be granted *forthwith* by any circuit

Nor was there any showing in this case of irreparable harm in the absence of injunctive relief. Nevertheless, petitioner was forced to bear the burdens of extended litigation, making clear the need for absolute judicial immunity.[14]

As discussed, both the English common-law cases and the decisions of this Court identify the burdens of harassing litigation, rather than the threat of pecuniary loss, as threatening judicial independence. In suits for injunctive relief, just as in suits for damages, the likely scenario was well stated by one of the justices in *Taaffe* v. *Downes:*

> "[Without the doctrine of judicial immunity, judges] become amenable to every other species of correction by a Court . . . . One hour at the bar—the next at the bench, of the same or some other Court. They would have a busy and harassing time, getting from one station to the other—from the Judge to the accused—from the corrector to the corrected." 13 Eng. Rep., at 20, n. *(a)*.

The ever-present threat of burdensome litigation, made realistic by today's decision, may well influence judicial determinations, particularly in close cases where the decision is likely to be unpopular.

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court" to any person who shows there is probable cause to believe he is being unlawfully detained (emphasis added). Moreover, Virginia Code § 19.2–124 (1983) provides a specific procedure for appealing unreasonable bail determinations "successively to the next higher court . . . up to and including the Supreme Court of Virginia." The Court suggests that in view of the short duration of pretrial detention here, these remedies may not have been available. There has been no showing to this effect. In any event, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), indicates that judicial immunity does not depend upon the availability of other remedies.

[14] Responding to this dissent, the Court states that there has been no showing of unavailability of alternative remedies because petitioner never challenged the injunctive relief awarded. *Ante*, at 542, n. 22. The point, however, is that this suit for injunctive relief was allowed to proceed against a judicial official without a showing, or finding by the District Court, that alternative remedies were unavailable, or that there would be irreparable harm.

Suits for injunctive relief may pose even greater threats to judicial independence if they are successful and an injunction is ordered. The specter of contempt proceedings for alleged violations of injunctive orders is likely to inhibit unbiased judicial decisionmaking as much as the threat of liability for damages. Again, this suit is a case in point. The injunctive order entered here was of unlimited duration and enjoined petitioner from authorizing the pretrial detention of any person charged with a certain class of misdemeanor, *unless* that person was "lawfully deemed likely to be a danger to himself or to others," and "only so long as such danger persists." App. 22. Whether a particular defendant is "likely to be a danger to himself or to others" and how "long [that danger will] last" are questions normally and necessarily left to the discretion of the presiding judge. The threat of contempt—with the possibility of a fine or even imprisonment—could well deter even the most courageous judge from exercising this discretion independently and free from intimidation.[15]

Finally, harassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees. Perhaps for understandable reasons, the Court's opinion passes lightly over the effect of § 1988. In fact, that provision has become a major additional source of litigation. Since its enactment in 1976, suits against state

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[15] The Court states that "[n]o judgment calls are required in following the court's [injunctive] order that petitioner no longer impose bond for offenses for which no incarceration is authorized by statute." *Ante*, at 542, n. 22. This statement is inaccurate. The Virginia statute (now repealed) under which respondents' bail was set permitted jail time for nonincarcerable offenses if the magistrate determined that the arrestee posed a danger to himself or to others. The determination of dangerousness, of course, requires a "judgment call" by the judicial official. By enjoining petitioner from authorizing pretrial detention for arrestees charged with nonincarcerable offenses "solely because they cannot meet bond," the District Court's order threatened mistaken "judgment calls" with contempt proceedings. Injunctive relief often will limit a judicial officer's discretion by increasing the risk of contempt.

officials under § 1983 have increased geometrically.[16] Congress enacted § 1988 for the specific purpose of facilitating and encouraging citizens of limited means to obtain counsel to pursue § 1983 remedies. But §§ 1983 and 1988 are available regardless of the financial ability of a plaintiff to engage private counsel. The lure of substantial fee awards,[17] now routinely made to prevailing § 1983 plaintiffs, assures that lawyers will not be reluctant to recommend and press these suits.[18] The Court again ignores reality when it suggests

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[16] Civil rights cases accounted for 8.3% of the total civil litigation in the Federal District Courts for the 12 months ended June 30, 1982, and in 1982 civil rights suits filed by state prisoners against state officials had increased 115.6% over the number of similar suits filed in 1977 before the prospect of a fee award under § 1988 became an added incentive to § 1983 claims. Annual Report of the Director of the Administrative Office of the United States Courts 100–103 (1982).

[17] Recent fee awards under § 1988 have increased with the precipitous rise in hourly rates. In *Blum* v. *Stenson*, 465 U. S. 886 (1984), for example, hourly rates of $95 to $105 for second- and third-year associates were found to be the "prevailing rates" in the community. Indeed, large fee awards recently have been awarded against state-court judges. See, *e. g.*, *Morrison* v. *Ayoob*, No. 78–267 (WD Pa. 1983) (fees of $17,412 and $5,075 awarded against state-court judges in suit for injunctive and declaratory relief), aff'd, 727 F. 2d 1100 (CA3), rehearing denied, 728 F. 2d 176 (1984), cert. denied, *post*, p. 973.

[18] Nor, as this case illustrates, do the burdens of litigation necessarily end when a district court approves a fee as reasonable. The Court's decision makes it likely that a request for an additional fee will be made for services rendered in the Court of Appeals and this Court. Such a request could result in ongoing litigation. Regrettably, disputes over the reasonableness of § 1988 fee awards often become the major issue in the entire litigation. This is demonstrated by the fact that two attorney's fees cases have been litigated in this Court in successive Terms. *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983); *Blum* v. *Stenson*, *supra*. See also *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 641 F. 2d 880 (1980) (en banc); *National Assn. of Concerned Veterans* v. *Secretary of Defense*, 219 U. S. App. D. C. 94, 675 F. 2d 1319 (1982). Moreover, work on fee petitions may be compensated at higher hourly rates than work on the merits. See, *e. g.*, *Morrison* v. *Ayoob*, *supra* (hourly rates of $40 and $75 awarded to legal services firm that initially prosecuted the § 1983 claim; fees of $45 and $110 awarded to private firm hired to prepare and litigate the fee petition).

that the availability of injunctive relief under § 1983, combined with the prospect of attorney's fees under § 1988, poses no serious threat of harassing litigation with its potentially adverse consequences for judicial independence.

IV

In sum, I see no principled reason why judicial immunity should bar suits for damages but not for prospective injunctive relief. The fundamental rationale for providing this protection to the judicial office—articulated in the English cases and repeated in decisions of this Court—applies equally to both types of asserted relief. The underlying principle, vital to the rule of law, is assurance of judicial detachment and independence. Nor is the Court's decision today in the broader public interest that the doctrine of absolute immunity is intended to serve. *Bradley*, 13 Wall., at 349.

HOOVER ET AL. *v.* RONWIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1474. Argued January 16, 1984—Decided May 14, 1984

Respondent Ronwin (hereafter respondent) was an unsuccessful candidate for admission to the Arizona Bar in 1974. Pursuant to the Arizona Constitution, the Arizona Supreme Court has plenary authority to determine admissions to the bar. Under the Arizona Supreme Court Rules in effect in 1974, a Committee on Examinations and Admissions (Committee), appointed by the court, was authorized to examine applicants on specified subjects. The Rules required the Committee to submit its grading formula to the court prior to giving the examination. After grading the examination, the Committee was directed to submit its recommendations for the admission of applicants to the court, which then made the final decision to grant or deny admission to practice. Under the Rules, a rejected applicant was entitled to seek individualized review of the Committee's adverse recommendation by filing a petition with the court. After the Arizona Supreme Court denied respondent's petition for review, he ultimately filed this action in Federal District Court against the Arizona State Bar, members of the Committee (including petitioners), and others. Respondent alleged that petitioners had conspired to restrain trade in violation of § 1 of the Sherman Act by "artificially reducing the numbers of competing attorneys in the State." He argued that the Committee had set the grading scale on the examination with reference to the number of new attorneys it thought desirable, rather than with reference to some "suitable" level of competence. Petitioners contended that they were immune from antitrust liability under the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341. The District Court dismissed the complaint on the ground, *inter alia*, of failure to state a justiciable claim. The Court of Appeals reversed, holding that although petitioners ultimately might be able to show that they were entitled to state-action immunity, the District Court should not have decided the issue on a motion to dismiss.

Held: The District Court properly dismissed the complaint for failure to state a claim on which relief could be granted. Pp. 567–582.

(a) Under *Parker*, when a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws. A state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legisla-

ture for purposes of the state-action doctrine. *Bates* v. *State Bar of Arizona*, 433 U. S. 350. When the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization, there must be a showing that the challenged conduct is pursuant to a clearly articulated state policy to replace competition with regulation, and the degree to which the state legislature or supreme court supervises its representative may be relevant to the inquiry. However, where the challenged conduct is in fact that of the state legislature or supreme court, the issues of "clear articulation" and "active supervision" need not be addressed. Pp. 567–569.

(b) In this case, the actions of the Committee with regard to the bar examination grading formula cannot be divorced from the Arizona Supreme Court's exercise of its sovereign powers. Although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, under the court's Rules the court itself retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the challenged conduct was in reality that of the Arizona Supreme Court and is therefore exempt from Sherman Act liability under the state-action doctrine. Cf. *Bates* v. *State Bar of Arizona*, *supra*. Pp. 569–574.

(c) *Bates* cannot be distinguished on the ground that the Arizona Supreme Court is not a petitioner in this case and was not named as a defendant in the complaint, or on the ground that *Parker* is inapplicable because respondent is not challenging the Arizona Supreme Court's conduct. The same situation existed in *Bates*. As in *Bates*, the real party in interest is the Arizona Supreme Court. The case law, as well as the State Supreme Court's Rules, makes clear that the court made the final decision on each applicant. To allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived illegal conspiracies among the committees, commissions, or others who necessarily must advise the sovereign would emasculate the *Parker* v. *Brown* doctrine. Pp. 574–582.

686 F. 2d 692, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN and MARSHALL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 582. REHNQUIST, J., took no part in the decision of the case. O'CONNOR, J., took no part in the consideration or decision of the case.

Charles R. Hoover, pro se, argued the cause for petitioners. With him on the briefs were *Jefferson L. Lankford* and *Donn G. Kessler*. *Philip E. von Ammon* filed a brief for the State

Bar of Arizona et al. as respondents under this Court's Rule 19.6, in support of petitioners.

Respondent *Edward Ronwin* argued the cause and filed a brief *pro se*.

Acting Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General Baxter, John H. Garvey, Barry Grossman* and *Nancy C. Garrison*.*

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the state-action doctrine of immunity from actions under the Sherman Act applies to the grading of bar examinations by the Committee appointed by, and according to the Rules of, the Arizona Supreme Court.

I

Respondent Ronwin was an unsuccessful candidate for admission to the Bar of Arizona in 1974. Petitioners were four members of the Arizona Supreme Court's Committee on Examinations and Admissions (Committee).[1] The Arizona

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*Briefs of *amici curiae* urging reversal were filed for the National Conference of Bar Examiners by *Kurt W. Melchior, Allan Ashman*, and *Jan T. Chilton;* and for the State Bar of California by *Henry C. Thumann, Herbert M. Rosenthal, Truitt A. Richey, Jr.*, and *Robert M. Sweet*.

A brief of *amici curiae* was filed for the State of Colorado et al. by *Stephen H. Sachs*, Attorney General of Maryland, *Charles O. Monk II* and *Linda H. Jones*, Assistant Attorneys General, *Duane Woodard*, Attorney General of Colorado, *Thomas P. McMahon*, First Assistant Attorney General, *Thomas J. Miller*, Attorney General of Iowa, *John R. Perkins*, Assistant Attorney General, *Robert Abrams*, Attorney General of New York, *Lloyd Constantine*, Assistant Attorney General, *William M. Leech, Jr.*, Attorney General of Tennessee, *William J. Haynes, Jr.*, Deputy Attorney General, *Jim Mattox*, Attorney General of Texas, *David R. Richards*, Executive Assistant Attorney General, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General.

[1] Although petitioners represent only four of the seven members of the Committee at the time of the February 1974 bar examination, Ronwin named all seven members in his original complaint. Apparently, three of

Constitution vests authority in the court to determine who should be admitted to practice law in the State. *Hunt* v. *Maricopa County Employees Merit System Comm'n*, 127 Ariz. 259, 261–262, 619 P. 2d 1036, 1038–1039 (1980); see also Ariz. Rev. Stat. Ann. § 32–275 (1976). Pursuant to that authority, the Arizona Supreme Court established the Committee to examine and recommend applicants for admission to the Arizona Bar.[2] The Arizona Supreme Court Rules, adopted by the court and in effect in 1974,[3] delegated certain responsibilities to the Committee while reserving to the court the ultimate authority to grant or deny admission. The

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the original defendants to this action did not join, for reasons not apparent, the petition for certiorari in this Court. There is no claim that these members of the Committee failed to participate in or dissented from the actions of the Committee.

[2] The procedure in Arizona is not unique to that State. In recent years, the burgeoning number of candidates for admission to practice law and the increased complexity of the subjects that must be tested have combined to make grading and administration of bar examinations a burdensome task. As a result, although the highest court in each State retains ultimate authority for granting or denying admission to the bar, each of those courts has delegated to a subordinate committee responsibility for preparing, grading, and administering the examination. See F. Klein, S. Leleiko, & J. Mavity, Bar Admission Rules and Student Practice Rules 30–33 (1978).

[3] The parties disagree on the wording of the Rules at the time Ronwin took the bar examination. The disagreement centers around the effective date of some amendments promulgated in 1974. Petitioners contend that the amendments took effect before Ronwin took the February 1974 bar examination; Ronwin submits that they became effective in March 1974. Ronwin concedes that the Supreme Court order amending the Rules provided that the amendments would become effective in January 1974. Notwithstanding this directive, he argues that Ariz. Rev. Stat. Ann. § 12–109 (1982) provided that amendments to the Supreme Court's Rules may not become effective until 60 days after publication and distribution. Since the Supreme Court released the amendments on January 11, Ronwin submits that the earliest possible effective date was March 12.

Ronwin has misread § 12–109. That section only applied to Rules that regulated pleading, practice, and procedure in judicial proceedings in state courts. By its terms, the statute did not limit the jurisdiction of the Arizona Supreme Court to establish the terms of admission to practice law in the State. See Ariz. Rev. Stat. Ann. § 32–275 (1976).

Rules provided that the Committee "shall examine applicants" on subjects enumerated in the Rules and "recommend to th[e] court for admission to practice" applicants found to have the requisite qualifications. Rule 28(a) (1973).[4] They also authorized the Committee to "utilize such grading or scoring system as the Committee deems appropriate in its discretion,"[5] and to use the Multi-State Bar Examination. Rule 28(c) VII A (1973), as amended, 110 Ariz. xxvii, xxxii (1974). Even with respect to "grading or scoring," the court did not delegate final authority to the Committee. The Rules directed the Committee to file the formula it intended to use in grading the examination with the court 30 days prior to giving the examination.[6] Also, after grading the examination and compiling the list of those applicants whom it con-

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[4] Rule 28(a) provided:

"Examination and Admission. . . . The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court. . . . The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions. . . . The court will then consider the recommendations and either grant or deny admission."

[5] According to Ronwin's complaint, the Committee announced before the February examination that the passing grade on the test would be 70, but it assigned grades using a scaled scoring system. Under this system, the examinations were graded first without reference to any grading scale. Thus, each examination was assigned a "raw score" based on the number of correct answers. The Committee then converted the raw score into a score on a scale of zero to 100 by establishing the raw score that would be deemed the equivalent of "seventy." See n. 19, *infra*.

[6] Rule 28(c) VII B provided:

"The Committee on Examinations and Admissions will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination." 110 Ariz., at xxxii.

sidered qualified to practice law in the State, the Committee was directed to submit its recommendations to the court for final action. Rule 28(a). Under the Rules and Arizona case law, only the court had authority to admit or deny admission.[7] Finally, a rejected applicant was entitled to seek individualized review of an adverse recommendation of the Committee by filing a petition directly with the court.[8] The

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[7] See n. 4, *supra; Application of Courtney*, 83 Ariz. 231, 233, 319 P. 2d 991, 993 (1957) ("[T]his court may in the exercise of its inherent powers, admit to the practice of law with or without favorable action by the Committee"); *Hackin* v. *Lockwood*, 361 F. 2d 499, 501 (CA9) ("[W]e find the power to grant or deny admission is vested solely in the Arizona Supreme Court"), cert. denied, 385 U. S. 960 (1966). See also *Application of Burke*, 87 Ariz. 336, 351 P. 2d 169 (1960).

[8] Rule 28(c) XII F provided:

"1. An applicant aggrieved by any decision of the Committee

"(A) Refusing permission to take an examination upon the record;

"(B) Refusing permission to take an examination after hearing;

"(C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;

"may within 20 days after such occurrence file a verified petition with this Court for a review. . . .

"2. A copy of said petition shall be promptly served upon the chairman or some member of the Committee and the Committee shall within 15 days of such service transmit said applicant's file and a response to the petition fully advising this Court as to the Committee's reasons for its decision and admitting or contesting any assertions made by applicant in said petition. Thereupon this Court shall consider the papers so filed together with the petition and response and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law." 110 Ariz., at xxxv–xxxvi.

Under Rule 28(c) XII G, an applicant who wished to challenge the grading of an answer to a particular question first had to submit his claim to the Committee for review. The applicant was entitled to request Arizona Supreme Court review only if three members of the Committee agreed with the applicant that his answer had not received the grade it deserved. The Rule also provided that the court could grant or deny such a request in its discretion. *Id.*, at xxxvi–xxxvii.

Rules required the Committee to file a response to such a petition and called for a prompt and fair decision on the applicant's claims by the Arizona Supreme Court.

Ronwin took the Arizona bar examination in February 1974.[9] He failed to pass, the Committee recommended to the Arizona Supreme Court that it deny him admission to the Bar, and the court accepted the recommendation. Ronwin petitioned the court to review the manner in which the Committee conducted and graded the examination. In particular, he alleged that the Committee had failed to provide him with model answers to the examination, had failed to file its grading formula with the court within the time period specified in the Rules, had applied a "draconian" pass-fail process, had used a grading formula that measured group, rather than individual, performance, had failed to test applicants on an area of the law on which the Rules required testing, and had conducted the examination in a "pressure-cooker atmosphere." He further alleged that the Committee's conduct constituted an abuse of discretion, deprived him of due process and equal protection, and violated the Sherman Act.[10] The court denied his petition and two subsequent petitions for rehearing.[11] Ronwin then sought review of the Arizona

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[9] The Arizona Supreme Court Rules instructed the Committee to give two examinations each year—one in July and one in February. *Id.*, at xxxii.

[10] He also alleged that the Committee had violated his constitutional rights by refusing, after the grades had been released, to provide him with the questions and answers to the Multi-State portion of the examination.

[11] Rule 28(c) XII F 2 provides, with respect to the petition of an aggrieved applicant, that the Arizona Supreme Court "shall consider" the petition and response, and "hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision." 110 Ariz., at xxxvi. Ronwin makes no claim that the court failed to comply with its Rules, although—of course—he disagrees with the court's judgment denying his petition. Thus, the court's denial of his petition must be construed as a consideration and rejection of the arguments made in the petition—including Ronwin's claim that the Sherman Act was violated.

Supreme Court's action in this Court. We denied his petition for certiorari. 419 U. S. 967 (1974).

Some four years later, in March 1978, Ronwin filed this action in the United States District Court for the District of Arizona. Petitioners were named as defendants in the suit in their capacity as individual members of the Committee.[12] Ronwin renewed his complaint that petitioners had conspired to restrain trade in violation of § 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, by "artificially reducing the numbers of competing attorneys in the State of Arizona."[13] The gist of Ronwin's argument is that the Committee of which petitioners constituted a majority had set the grading scale on the February examination with reference to the number of new attorneys they thought desirable, rather than with reference to some "suitable" level of competence. Petitioners moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which

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[12] Also named as defendants were petitioners' spouses and the Arizona State Bar. The District Court dismissed the suit as to these defendants and the Court of Appeals affirmed the dismissal. *Ronwin* v. *State Bar of Arizona*, 686 F. 2d 692, 694, n. 1 (CA9 1981). Ronwin challenged this aspect of the Court of Appeals' opinion in a conditional cross-petition for certiorari. We denied the cross-petition. *Ronwin* v. *Hoover*, 461 U. S. 938 (1983).

[13] The averment of a Sherman Act violation in Ronwin's complaint is as follows:

"The aforesaid conduct [the "scoring system or formula," see n. 4, *supra*], which the Defendants entered into as a conspiracy or combination, was intended to and did result in a restraint of trade and commerce among the Several States by artificially reducing the numbers of competing attorneys in the State of Arizona; and, in further consequence of said conduct, Plaintiff was among those artificially prevented from entering into competition as an attorney in the State of Arizona and thereby further deprived of the right to compete as an attorney for the legal business deriving from or involving the Several States of the United States, including Arizona." App. 10–11.

The adequacy of these conclusory averments of *intent* is far from certain. The Court of Appeals, however, found the complaint sufficient. Accordingly, we address the "state action" issue.

relief could be granted, and under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. In particular, petitioners alleged that, acting as a Committee, they were immune from antitrust liability under *Parker* v. *Brown*, 317 U. S. 341 (1943). Petitioners also argued that Ronwin suffered no damage from the conduct of which he complained and that the Committee's conduct had not affected interstate commerce. The District Court granted petitioners' motion after finding that the complaint failed to state a justiciable claim, that the court had no jurisdiction, and that Ronwin lacked standing.[14]

The Court of Appeals for the Ninth Circuit reversed the dismissal of the complaint. *Ronwin* v. *State Bar of Arizona*, 686 F. 2d 692 (1982). The Court of Appeals read the District Court's ruling that Ronwin had failed to state a claim as a holding that bar examination grading procedures are immune from federal antitrust laws under *Parker* v. *Brown*. It reasoned that, although petitioners ultimately might be able to show that they are entitled to state-action immunity, the District Court should not have decided this issue on a Rule 12(b)(6) motion. See 686 F. 2d, at 698. The court stated that under *Parker* and its progeny, the mere fact that petitioners were state officials appointed by the Arizona Supreme Court was insufficient to confer state-action immunity on them. 686 F. 2d, at 697. Relying on its reading of several recent opinions of this Court,[15] the Court of Appeals noted that the petitioners might be able to invoke the state-

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[14] The District Court also denied Ronwin's motion requesting the trial judge to recuse himself. The Court of Appeals held that the District Court had not abused its discretion in denying the motion. 686 F. 2d., at 701. We declined to review that finding. *Ronwin* v. *Hoover*, *supra*.

[15] *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978).

action doctrine, but reasoned that they first must show that they were acting pursuant to a "clearly articulated and affirmatively expressed . . . state policy." *Id.*, at 696. Therefore, dismissal for failure to state a claim was improper. The court also held that Ronwin had standing to bring this action. The case was remanded to the District Court for further action.[16]

We granted certiorari to review the Court of Appeals' application of the state-action doctrine. 461 U. S. 926 (1983). We now reverse.

II

The starting point in any analysis involving the state-action doctrine is the reasoning of *Parker* v. *Brown*. In *Parker*, the Court considered the antitrust implications of the California Agriculture Prorate Act—a state statute that restricted competition among food producers in California. Relying on principles of federalism and state sovereignty, the Court declined to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 350–351.

Thus, under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of

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[16] The Court of Appeals also held that the District Court should give Ronwin the opportunity to show that petitioners' actions sufficiently affected interstate commerce to fall within the jurisdiction of the Sherman Act. Petitioners did not seek review of this holding.

the State, see *id.*, at 351, and *ipso facto* are exempt from the operation of the antitrust laws.

In the years since the decision in *Parker*, the Court has had occasion in several cases to determine the scope of the state-action doctrine. It has never departed, however, from *Parker*'s basic reasoning. Applying the *Parker* doctrine in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 360 (1977), the Court held that a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action. See also *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 790 (1975). Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court,[17] but is carried out by others pursuant to state authorization. See, *e. g.*, *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982) (municipal regulation of cable television industry); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980) (private price-fixing arrangement authorized by State); *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978) (new franchises controlled by state administrative board). In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 413–415 (1978) (opinion of BRENNAN, J.); see *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363, 369–370 (CA9 1974). If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. As a result, in cases

[17] This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine.

involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. *Boulder*, *supra*, at 54. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See *Midcal Aluminum*, *supra*, at 105; *Goldfarb*, *supra*, at 791. When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."

Pursuant to the State Constitution, the Arizona Supreme Court has plenary authority to determine admissions to the Bar.[18] Therefore, the first critical step in our analysis must be to determine whether the conduct challenged here is that of the court. If so, the *Parker* doctrine applies and Ronwin has no cause of action under the Sherman Act.

III

At issue here is the Arizona plan of determining admissions to the bar, and petitioners' use thereunder of a grading formula. Ronwin has alleged that petitioners conspired to use

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[18] Ronwin does not dispute that regulation of the bar is a sovereign function of the Arizona Supreme Court. In *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 361 (1977), the Court noted that "the regulation of the activities of the bar is at the core of the State's power to protect the public." Likewise, in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975), the Court stated: "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" See also *In re Griffiths*, 413 U. S. 717, 722–723 (1973). Few other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice."

that formula to restrain competition among lawyers.[19] His argument is that, although petitioners qualified as state officials in their capacity as members of the Committee, they acted independently of the Arizona Supreme Court. As a result, the argument continues, the Committee's actions are those of a Supreme Court representative, rather than those of the court itself, and therefore are not entitled to immunity.

We cannot agree that the actions of the Committee can be divorced from the Supreme Court's exercise of its sovereign powers. The Court's opinion in *Bates* v. *State Bar of Arizona*, 433 U. S., at 360, is directly pertinent.[20] In *Bates*, two

[19] Ronwin's complaint, see *supra*, at 565, focuses on the grading formula as the means used to "restrain competition." He describes it as follows: "The Defendants did not grade on a Zero to One Hundred (0 to 100) scale; rather they used a "raw score" system. After the raw scores were known, the Defendants picked a particular raw score value as equal to the passing grade of Seventy (70). Thereby the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy (70); rather than achievement by each Bar applicant of a pre-set standard." App. 10.

Apparently Ronwin was trying to describe a "procedure commonly known as test standardization" or "scaled scoring." See Brief for State Bar of California as *Amicus Curiae* 7. This method of scoring, viewed as the fairest by the Educational Testing Service (ETS) for the Multistate Bar Examination (MBE), see S. Duhl, The Bar Examiners' Handbook 61–62 (2d ed. 1980), published by The National Conference of Bar Examiners, is described as follows:

"In addition to the 'raw' scores (number of correct answers), ETS reports a 'scaled' score for each applicant. In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination."

[20] Although the Court of Appeals recognized the similarity between this case and *Bates*, it found the facts in *Goldfarb* v. *Virginia State Bar*, *supra*,

attorneys were suspended temporarily from the practice of law in Arizona for violating a disciplinary rule of the American Bar Association (ABA) that prohibited most lawyer advertising. The Arizona Supreme Court had incorporated the ABA's advertising prohibition into the local Supreme Court Rules.[21] Those Rules also provided that the Board of Governors of the Arizona State Bar Association, acting on the recommendation of a local Bar disciplinary committee, could recommend the censure or suspension of a member of the Bar for violating the advertising ban. Under the Rules, the Board of Governor's recommendation automatically would become effective if the aggrieved party did not object to the recommendation within 10 days. If the party objected, he was entitled to have the Arizona Supreme Court review the findings and recommendations of the Board of Governors and the local committee. The plaintiffs challenged the Rule on Sherman Act and First Amendment grounds. This Court ultimately concluded that the ABA Rule violated the First Amendment, but it first held that the State Bar Association was immune from Sherman Act liability because its enforcement of the disciplinary Rules was state action. In reaching this conclusion, the Court noted that, although only the State Bar was named as a defendant in the suit, the suspended attorneys' complaint was with the State. The Court stated:

> "[T]he appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson*, 106

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to be more analogous. The court's reliance on *Goldfarb* was misplaced. As the dissent of Judge Ferguson noted, *Goldfarb* involved procedures that were not approved by the State Supreme Court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself.

[21] Rule 29(a) of the Supreme Court of Arizona provided: "The duties and obligations of members [of the Bar] shall be as prescribed by the Code of Professional Responsibility of the American Bar Association. . . ."

> Ariz. 34, 470 P. 2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision." *Id.*, at 361.

The opinion and holding in *Bates* with respect to the state-action doctrine were unanimous.

The logic of the Court's holding in *Bates* applies with greater force to the Committee and its actions. The petitioners here were each members of an official body selected and appointed by the Arizona Supreme Court. Indeed, it is conceded that they were state officers. The court gave the members of the Committee discretion in compiling and grading the bar examination, but retained strict supervisory powers and ultimate full authority over its actions. The Supreme Court Rules specified the subjects to be tested, and the general qualifications required of applicants for the Bar. With respect to the specific conduct of which Ronwin complained—establishment of an examination grading formula—the Rules were explicit. Rule 28(c) VII A authorized the Committee to determine an appropriate "grading or scoring system" and Rule 28(c) VII B required the Committee to submit its grading formula to the Supreme Court at least 30 days prior to the examination.[22] After giving and grading the examination, the Committee's authority was limited to

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[22] Following petitioners' request for a rehearing in the Court of Appeals, the parties debated whether and to what extent the Committee complied with this Rule. For purposes of determining the application of the state-action doctrine, it is sufficient that the Rules contained an enforceable provision calling for submission of the grading formula. Moreover, the Rules contained a review procedure that allowed an aggrieved applicant to bring to the Supreme Court's attention any failure of the Committee to comply with the filing requirements in Rule 28(c) VII B. The record reveals that Ronwin, in fact, alleged in his petition for review in the Arizona Supreme Court that the Committee had not filed its grading formula within the time provided in the Rule. The court rejected the petition. See *supra*, at 564.

making recommendations to the Supreme Court. The court itself made the final decision to grant or deny admission to practice. Finally, Rule 28(c) XII F provided for a detailed mandatory review procedure by which an aggrieved candidate could challenge the Committee's grading formula.[23] In light of these provisions and the Court's holding and reasoning in *Bates*, we conclude that, although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenges was in reality that of the Arizona Supreme Court. See *Bates*, 433 U. S., at 361. It therefore is exempt from Sherman Act liability under the state-action doctrine of *Parker* v. *Brown*.[24]

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[23] This procedure allowed a disappointed applicant to challenge "[f]or any substantial cause" a Committee decision other than "a claimed failure to award a satisfactory grade." Rule 28(c) XII F 1(C). As we have noted, Ronwin took full advantage of Rule 28(c) XII F 1(C) in his challenge to the action of the Committee and the court. See *supra*, at 564. He did not, however, challenge the particular grade assigned to any of his answers.

[24] The Solicitor General, on behalf of the United States as *amicus*, contends that our recent opinion in *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982), precludes a finding that the Committee's action was attributable to the Arizona Supreme Court. Contrary to the Solicitor General's suggestion, our reasoning in *Boulder* supports the conclusion we reach today. In *Boulder*, we reiterated the analysis of JUSTICE BRENNAN's opinion in *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978). We noted that the state-action doctrine is grounded in concepts of federalism and state sovereignty. 455 U. S., at 54. We stated that *Parker* did not confer state-action immunity automatically on municipalities, because the actions of a municipality are not those of the State itself. 455 U. S., at 53. Under our holding in *Boulder*, municipalities may be eligible for state-action immunity, but only "to the extent that they ac[t] pursuant to a clearly articulated and affirmatively expressed state policy." *Id.*, at 54; see also *Lafayette*, *supra*, at 411–412 (opinion of BRENNAN, J.). Consistent with our reasoning in *Boulder*, our decision today rests on our conclusion that the conduct Ronwin complains of clearly is the action of the State. *Bates* is explicit authority for this conclusion.

At oral argument, Ronwin suggested that we should not attribute to the Arizona Supreme Court an intent to approve the anticompetitive activity of petitioners in the absence of proof that the court was aware that petitioners had devised a grading formula the purpose of which was to limit the number of lawyers in the State. This argument misconceives the basis of the state-action doctrine. The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." *Parker*, 317 U. S., at 351. The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of "the State acting as a sovereign." *Bates*, *supra*, at 360. The action at issue here, whether anticompetitive or not, clearly was that of the Arizona Supreme Court.[25]

IV

The dissenting opinion of JUSTICE STEVENS would, if it were adopted, alter dramatically the doctrine of state-action immunity. We therefore reply directly. The dissent concedes, as it must, that "the Arizona Supreme Court exercises sovereign power with respect to admission to the Arizona Bar," and "if the challenged conduct were that of the court, it would be immune under *Parker*." *Post*, at 588. It also is con-

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[25] Our holding that petitioners' conduct is exempt from liability under the Sherman Act precludes the need to address petitioners' contention that they are immune from liability under the *Noerr-Pennington* doctrine. See *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961).

We also do not address Ronwin's contention that the Arizona method of limiting bar admissions violates the Fifth and Fourteenth Amendments. As Ronwin concedes, he made this argument for the first time in his response to petitioners' motion for rehearing in the Court of Appeals. His failure to raise this issue in a timely manner precludes our consideration.

ceded that the members of the court's Commitee on Examinations and Admissions—petitioners here—are state officers. These concessions are compelled by the Court's decision in *Bates*, and we think they dispose of Ronwin's contentions.

In its effort to distinguish *Bates*, the dissent notes that the Arizona Supreme Court "is not a petitioner [in this case], nor was it named as a defendant in respondent's complaint," and "because respondent is not challenging the conduct of the Arizona Supreme Court, *Parker [*v. *Brown]* is simply inapplicable." *Post*, at 588, 589. The dissent fails to recognize that this is precisely the situation that existed in *Bates*. In that case, the Supreme Court of Arizona was not a party in this Court, nor was it named as a defendant by the complaining lawyers. Yet, in our unanimous opinion, we concluded that the claims by appellants in *Bates* were "against the State," and that the "Arizona Supreme Court [was] the real party in interest; it adopted the rules, and it [was] the ultimate trier of fact and law in the enforcement process." *Bates* v. *State Bar of Arizona*, *supra*, at 361; see *supra*, at 571.[26]

The core argument of the dissent is that Ronwin has challenged only the action of the Committee and not that of the Arizona Supreme Court. It states that "there is no claim that the *court* directed [the Committee] to artificially reduce the number of lawyers in Arizona," and therefore the Committee cannot assert the sovereign's antitrust immunity. *Post*, at 592 (emphasis in original). The dissent does not acknowledge that, conspire as they might, the Committee could not reduce the *number* of lawyers in Arizona.[27] Only

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[26] The authority of the Arizona Supreme Court to determine who shall be admitted to the Bar, and by what procedure, is even more clearly defined than the role of that court in *Bates*. In that case, State Bar Committee members were not appointed by the court, and the court did not expressly accept or reject each of the Committee's actions.

[27] Under Arizona law, the responsibility is on the court—and only on it—to admit or deny admission to the practice of law. This Court certainly cannot assume that the Arizona court, in the exercise of its specifically reserved power under its Rules, invariably agrees with its Committee. Even if it did, however, it would be action of the sovereign.

the Arizona Supreme Court had the authority to grant or deny admission to practice in the State.[28] As in *Bates* "[t]he Arizona Supreme Court is the real party in interest." 433 U. S., at 361.

The dissent largely ignores the Rules of the Arizona Supreme Court.[29] A summary of the court's commands suggests why the dissent apparently prefers not to address them. The Arizona Supreme Court established the Committee for the sole purpose of examining and recommending applicants for admission to the Bar. Rule 28(a). Its Rules provided: "The examination and admission of applicants . . . *shall* conform to this Rule. . . . The committee *shall* examine applicants and recommend [qualified applicants] to this court. . . . Two examinations *will be* held each year. . . ." *Ibid.*; Rule 28(c) VI (1973), as amended, 110 Ariz. xxxii (1974) (emphasis added). The Rules also specified the subjects to be tested and required the Committee to submit its grading formula to the court in advance of each examination. Rule 28(c) VII (1973), as amended, 110 Ariz. xxxii (1974).

As a further safeguard, a disappointed applicant was accorded the right to seek individualized review by filing a petition directly with the court—as Ronwin did unsuccessfully. Pursuant to Rule 28(c) XII F, Ronwin filed a complaint with the court that contained a plethora of charges

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[28] Even if Committee members had decided to grade more strictly, under the grading formula approved by the court, for the purpose of reducing the total number of lawyers admitted to practice, the court knew and approved the *number* of applicants. This was the definitive action. There is nothing in the state-action doctrine, or in antitrust law, that permits us to question the motives for the sovereign action of the court.

[29] The dissent recites the provisions of the Rules regulating the composition and origin of the Committee and notes that the Rules require the Committee to recommend qualified applicants to the Supreme Court. *Post*, at 586. The dissent does not mention, however, several critical provisions, summarized in the text *infra*, that articulate the Arizona Supreme Court's intent to retain full authority over, and responsibility for, the bar admissions process.

including the substance of the complaint in this case. The court denied his petition as well as two petitions for rehearing. See *supra*, at 564. Thus, again there was *state action* by the court itself explicitly rejecting Ronwin's claim.[30] Finally, the

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[30] The dissent states, *post*, at 591–592, n. 15, that we "advanced the theory that *the* relevant 'state action'" was the State Supreme Court's denial of Ronwin's postexamination petitions filed with the court. (Emphasis supplied.) The dissent is inaccurate. Our holding is based on the court's direct participation in every stage of the admissions process, including retention of the sole authority to admit or deny. The critical action in this case was the court's decision to deny Ronwin admission to the Bar. The dissent's suggestion that the Arizona Supreme Court never made this decision simply ignores Arizona law. The Arizona Supreme Court has stated on several occasions that it, and not the Committee, makes the decision to admit or deny admission to applicants. In *Application of Burke*, 87 Ariz., at 338, 351 P. 2d, at 171–172, the court stated:

"[I]t is not the function of the committee to grant or deny admission to the bar. That power rests *solely* in the Supreme Court. . . . The committee's bounden duty is to 'put up the red flag' as to those applicants about whom it has some substantial doubt. If such doubt exists, then its recommendation should be withheld. The applicant may feel that any questions raised as to his character or qualifications are without substance. In such case, he may apply directly to this court for admission. In the final analysis—it *being a judicial function*—we have the *duty* of resolving those questions, one way or the other. . . ." (Emphasis supplied.)

In a similar vein, the court stated in *Application of Levine*, 97 Ariz. 88, 92, 397 P. 2d 205, 207 (1964):

"If the committee fails to recommend the admission of an applicant, he may challenge the committee's conclusions by an original application to this Court . . . . This Court will direct the committee to show cause why the applicant has been refused a favorable recommendation and on the applicant's petition and the committee's response, using our independent judgment, de novo determine whether the necessary qualifications have been shown."

See also *Application of Kiser*, 107 Ariz. 326, 327, 487 P. 2d 393, 394 (1971).

Thus, the Arizona Supreme Court repeatedly has affirmed its responsibility as the final decisionmaker on admissions to the Bar. The dissent, relying on the absence in the record before us of a specific order of the court at the time Ronwin was not admitted, nevertheless would have us hold that the Committee rather than the court made the final decisions as

case law, as well as the Rules, makes clear that the Arizona Supreme Court made the final decision on each applicant.[31] See n. 6, *supra*. Unlike the actions of the Virginia State Bar in *Goldfarb*, the actions of the Committee are governed by the court's Rules. Those Rules carefully reserve to the court the authority to make the decision to admit or deny, and that decision is the critical state action here.[32] See *Bates*, 433

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to admissions and denials of the applicants who took the examination in February 1974. If the dissent were correct, there would have been *no valid* action with respect to those who took that examination since, under Arizona law, the Committee had no independent power to act. Ronwin's complaint makes no such extreme averment, and certainly this Court will not assume that the Supreme Court of Arizona failed to discharge its responsibility. Moreover, as we have noted, *supra*, at 576–577, Ronwin's claims were specifically rejected by the court.

[31] It is true, of course, that framing examination questions and particularly the grading of the examinations involved the exercise of judgment and discretion by the examiners. This discretion necessarily was delegated to the Arizona Committee, just as it must be unless state supreme courts themselves undertake the grading. By its Rules, the Arizona Supreme Court gave affirmative directions to the Committee with respect to every nondiscretionary function, reserving the ultimate authority to control the number of lawyers admitted to the Arizona Bar. Ronwin avers a "conspiracy to limit the number" of applicants admitted. He makes no claim of animus or discriminatory intent with respect to himself.

Ronwin apparently would have us believe that grading examinations is an exact science that separates the qualified from the unqualified applicants. Ideally, perhaps, this should be true. But law schools and bar examining committees must identify a grade below which students and applicants fail to pass. No setting of a passing grade or adoption of a grading formula can eliminate—except on multiple choice exams—the discretion exercised by the grader. By its very nature, therefore, grading examinations does not necessarily separate the competent from the incompetent or—except very roughly—identify those qualified to practice law and those not qualified. At best, a bar examination can identify those applicants who are *more* qualified to practice law than those less qualified.

[32] JUSTICE STEVENS' dissent states that "[a]ny possible claim that the challenged conduct is that of the State Supreme Court is squarely foreclosed by *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975)." *Post*, at 589. At issue in *Goldfarb* was a Sherman Act challenge to minimum-fee schedules maintained by the Fairfax County Bar Association and enforced

U. S., at 359–361. Our opinion, therefore, also is wholly consistent with the Court's reasoning in *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978) and *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982).[33]

Our holding is derived directly from the reasoning of *Parker* and *Bates*. Those cases unmistakably hold that, where the action complained of—here the failure to admit

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by the Virginia State Bar. In *Goldfarb*, state law did not refer to lawyers' fees, the Virginia Supreme Court Rules did not direct the State Bar to supply fee schedules, and the Supreme Court did not approve the fee schedules established by the State Bar. To the contrary, the court "directed lawyers not 'to be controlled' by fee schedules." 421 U. S., at 789. Thus, even though the State Bar was a state agency, the Court concluded that "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." *Id.*, at 790. As is evident from the provisions in the Arizona Supreme Court Rules, this case arises under totally different circumstances, although the relevant legal principles are the same. The dissent's reliance on *Goldfarb* simply misreads the decision in that case.

[33] The dissent relies on *Boulder*, arguing that the "clearly articulated and affirmatively expressed state policy" does not exist in this case. *Post*, at 594–596. What the dissent overlooks is that the Court in *Boulder* was careful to say that action is not "exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette* . . . ." 455 U. S., at 52. Thus, unlike the dissent here, JUSTICE BRENNAN in *Boulder* was careful to distinguish between action by the sovereign itself and action taken by a subordinate body.

The dissent also cites *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), and *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), as presenting situations analogous to the action of the Arizona Supreme Court. This argument overlooks the fundamental difference between this case and the several cases cited by respondent. In each of those cases, it was necessary for the Court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the State "acting as sovereign." Here, as we have noted above, the Arizona Supreme Court, acting in its sovereign capacity, made the final decision to deny admission to Ronwin. See n. 30, *supra*.

Ronwin to the Bar—was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action. Application of that standard to the facts of this case requires that we reverse the judgment of the Court of Appeals.

The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker* v. *Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.[34]

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[34] The *amicus curiae* brief of the National Conference of Bar Examiners points out that many States have bar admission processes like those at issue in this case. See Brief for National Conference of Bar Examiners as *Amicus Curiae* 1, 2, 8. Typically, the state supreme court is the ultimate decisionmaker and a committee or board conducts the examinations pursuant to court rules. It is customary for lawyers of recognized standing and integrity to serve on these bodies, usually as a public duty and with little or no compensation. See S. Duhl, The Bar Examiner's Handbook 95, 99 (2d ed. 1980). In virtually all States, a significant percentage of those who take the bar examination fail to pass. See 1982 Bar Examination Statistics, 52 Bar Examiner 24–26 (1983). Thus, every year, there are thousands of aspirants who, like Ronwin, are disappointed. For example, in 1974 (the year Ronwin first took the Arizona bar examination), of the 43,798 applicants who took bar examinations nationwide, 10,440 failed to pass. 44 Bar Examiner 115 (1975). The National Conference of Bar Examiners, in its *amicus* brief, cautions that affirmance of the Court of

In summary, this case turns on a narrow and specific issue: who denied Ronwin admission to the Arizona Bar? The dissent argues, in effect, that since there is no court order in the record, the denial must have been the action of the Committee. This argument ignores the incontrovertible fact that under the law of Arizona *only* the State Supreme Court had authority to admit or deny admission to practice law:

> "[It] is not the function of the committee to grant or deny admission to the bar. That power rests solely in the Supreme Court . . . ." *Application of Burke*, 87 Ariz. 336, 338, 351 P. 2d 169, 171 (1960) (see n. 30, *supra*).

Thus, if the dissent's argument were accepted *all* decisions made with respect to admissions and denials of those who took the examination in February 1974 are void. Ronwin did not allege that he alone was a victim: his complaint avers

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Appeals in this case could well invite numerous suits. It is no answer to say that, of course, such suits are likely to be frivolous. Ronwin, who failed the bar in 1974, has been litigating his claim for a decade on the basis of a complaint that basically challenges the *motive* of the Arizona Committee. His claim is that the grading formula was devised for the purpose of limiting competition. If such an allegation is sufficient to survive a motion to dismiss, examining boards and committees would have to bear the substantial "discovery and litigation burdens" attendant particularly upon refuting a charge of improper motive. See Areeda, Antitrust Immunity for "State Action" after *Lafayette*, 95 Harv. L. Rev. 435, 451 (1981). Moreover, Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter "able citizens" from performing this essential public service. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982). In our view, as the action challenged by Ronwin was that of the State, the motive of the Committee in its recommendations to the court was immaterial. We nevertheless think, particularly in view of the decision below, that the consequences of an affirmance should be understood. The consequences of reversal by the Court today will have only a limited effect. Our attention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court.

that he "was among those artificially prevented from entering into competition as an attorney in the state of Arizona" by the Committee's action with respect to the February 1974 examination. We are unwilling to assume that the Arizona Supreme Court failed to comply with state law, and allowed the Committee alone to make the decisions with respect to the February 1974 examination. In any event, the record is explicit that Ronwin's postexamination petition complaining about his denial was rejected by an order of the Arizona Supreme Court. That there was state action at least as to Ronwin could not be clearer.

V

We conclude that the District Court properly dismissed Ronwin's complaint for failure to state a claim upon which relief can be granted. Therefore, the judgment of the Court of Appeals is

Reversed.

JUSTICE REHNQUIST took no part in the decision of this case. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

In 14th-century London the bakers' guild regulated the economics of the craft and the quality of its product. In the year 1316, it was adjudged that one Richard de Lughteburghe "should have the punishment of the hurdle" because he sold certain loaves of bread in London; the bread had been baked in Suthwerke, rather than London, and the loaves were not of "the proper weight."[1] Thus Richard had vio-

[1] H. Riley, Memorials of London and London Life in the XIIIth, XIVth, and XVth Centuries 119–120 (1868). The punishment is described in a footnote as "[b]eing drawn on a hurdle through the principal streets of the City." *Id.*, at 119, n. 5.

lated a guild restriction designed to protect the economic interests of the local bakers[2] as well as a restriction designed to protect the public from the purchase of inferior products.

For centuries the common law of restraint of trade has been concerned with restrictions on entry into particular professions and occupations. As the case of the Suthwerke baker illustrates, the restrictions imposed by medieval English guilds served two important but quite different purposes. The guilds limited the number of persons who might engage in a particular craft in order to be sure that there was enough work available to enable guild members to earn an adequate livelihood.[3] They also protected the public by ensuring that apprentices, journeymen, and master craftsmen would have the skills that were required for their work. In numerous occupations today, licensing requirements[4] may serve

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[2] "The principal reason for the existence of the gild was to preserve to its own members the monopoly of trade. No one not in the gild merchant of the town could buy or sell there except under conditions imposed by the gild. Foreigners coming from other countries or traders from other English towns were prohibited from buying or selling in any way that might interfere with the interest of the gildsmen. They must buy and sell at such times and in such places and only such articles as were provided by the gild regulations." E. Cheyney, An Introduction to the Industrial and Social History of England 52–53 (1920).

[3] "The craft gilds existed usually under the authority of the town government, though frequently they obtained authorization or even a charter from the crown. They were formed primarily to regulate and preserve the monopoly of their own occupations in their own town, just as the gild merchant existed to regulate the trade of the town in general. No one could carry on any trade without being subject to the organization which controlled that trade." *Id.*, at 55.

[4] Professor Handler has pointed out:

"Entry into various fields of endeavor is guarded by numerous licensing restrictions. Licenses are demanded of physicians and surgeons, dentists, optometrists, pharmacists and druggists, nurses, midwives, chiropodists, veterinarians, certified public accountants, lawyers, architects, engineers and surveyors, shorthand reporters, master plumbers, undertakers and embalmers, real estate brokers, junk dealers, pawnbrokers, ticket agents, liquor dealers, private detectives, auctioneers, milk dealers, peddlers,

either or both of the broad purposes of the medieval guild restrictions.

The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of both the development of the common law of restraint of trade and our antitrust jurisprudence. At the same time, the risk that the free market may not adequately protect the public from purveyors of inferior goods and services has provided a legitimate justification for the public regulation of entry into a wide variety of occupations. Private regulation is generally proscribed by the antitrust laws; public regulation is generally consistent with antitrust policy. A potential conflict arises, however, whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors who may engage in a particular trade. In fact private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest. See generally Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976).

The potential conflict with the antitrust laws may be avoided in either of two ways. The State may itself formulate the governing standards and administer the procedures

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masters pilots and steamship engineers, weighmasters, forest guides, motion picture operators, itinerant retailers on boats, employment agencies, commission merchants of farm produce, and manufacturers of frozen desserts, concentrated feeds, and commercial fertilizers. No factory, cannery, place of public assembly, laundry, cold storage warehouse, shooting gallery, bowling alley and billiard parlor, or place of storage of explosives can be operated nor can industrial house work be carried on without registration or license. Licenses are also required for the sale of minnows, use of fishing nets, and the operation of educational institutions, correspondence schools, filling stations and motor vehicles. Motion pictures cannot be exhibited unless licensed, and canal boats must be registered." M. Handler, Cases and Other Materials on Trade Regulation 3–4 (1937) (footnotes omitted).

that determine whether or not particular applicants are qualified. When the State itself governs entry into a profession, the evils associated with giving power over a market to those who stand to benefit from inhibiting entry into that market are absent. For that reason, state action of that kind, even if it is specifically designed to control output and to regulate prices, does not violate the antitrust laws. *Parker* v. *Brown*, 317 U. S. 341 (1943). Alternatively, the State may delegate to private parties the authority to formulate the standards and to determine the qualifications of particular applicants. When that authority is delegated to those with a stake in the competitive conditions within the market, there is a risk that public power will be exercised for private benefit. To minimize that risk, state policies displacing competition must be "clearly and affirmatively expressed" and must be appropriately supervised. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 103–106 (1980).

In this case respondent has been unable to obtain a license to practice law in Arizona. He alleges that this is not because of any doubts about his competence as a lawyer, but because petitioners have engaged in an anticompetitive conspiracy in which they have used the Arizona bar examination to artificially limit the number of persons permitted to practice law in that State. Petitioners claim that the alleged conspiracy is not actionable under § 1 of the Sherman Act, 15 U. S. C. § 1, because it represents the decision of the State. But petitioners do not identify any state body that has decided that it is in the public interest to limit entry of even fully qualified persons into the Arizona Bar. Indeed, the conspiracy that is alleged is not the product of any regulatory scheme at all; there is no evidence that any criterion except competence has been adopted by Arizona as the basis for granting licenses to practice law. The conspiracy respondent has alleged is private; market participants are allegedly

attempting to protect their competitive position through a misuse of their powers. Yet the Court holds that this conspiracy is cloaked in the State's immunity from the antitrust laws. In my judgment, the competitive ideal of the Sherman Act may not be so easily escaped.

I

Petitioners are members of the Arizona Supreme Court's Committee on Examinations and Admissions. The Arizona Supreme Court established the Committee to recommend applicants for admission to the Arizona Bar; it consists of seven members of the State Bar selected from a list of nominees supplied by the Arizona State Bar Association's Board of Governors.[5] Petitioners administered the 1974 bar examination which respondent took and failed. In his complaint, respondent alleged that after the scores of each candidate were known, petitioners selected a particular score which would equal the passing grade. The complaint alleges that the petitioners would adjust the grading formula in order to limit the number of persons who could enter the market and compete with members of the Arizona Bar. In this manner, respondent was "artificially prevented from entering into competition as an attorney in the State of Arizona."[6]

The Arizona Supreme Court has instructed petitioners to recommend for admission to the Bar "[a]ll applicants who receive a passing grade in the general examination and who are found to be otherwise qualified . . . ."[7] There is no indication that any criterion other than competence is appropriate under the Supreme Court's Rules for regulating admission to the Bar.[8] Indeed with respect to respondent's application

[5] Ariz. Sup. Ct. Rule 28(a).

[6] See App. 10–11.

[7] Ariz. Sup. Ct. Rule 28(c) VIII.

[8] Petitioners certainly do not suggest the existence of any other criterion under Arizona law. To the contrary, at oral argument they expressly acknowledged that there is no state policy adopting any criterion but competence for admission to the Bar. Tr. of Oral Arg. 22–24.

for admission, the Arizona Supreme Court wrote: "The practice of law is not a privilege but a right, conditioned solely upon the requirement that a person have the necessary mental, physical and moral qualifications." *Application of Ronwin*, 113 Ariz. 357, 358, 555 P. 2d 315, 316 (1976), cert. denied, 430 U. S. 907 (1977). In short, one looks in vain in Arizona law, petitioners' briefs, or the pronouncements of the Arizona Supreme Court for an articulation of any policy beside that of admitting only competent attorneys to practice in Arizona.

Thus, respondent does not challenge any state policy. He contests neither the decision to license those who wish to practice law, nor the decision to require a certain level of competence, as measured in a bar examination, as a precondition to licensing. Instead, he challenges an alleged decision to exclude even competent attorneys from practice in Arizona in order to protect the interests of the Arizona Bar.

As we have often reiterated in cases that involve the sufficiency of a pleading, a federal court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.[9] The allegations of the complaint must be taken as true for purposes of a decision on the pleadings.[10]

A judge reading a complaint of this kind is understandably somewhat skeptical. It seems highly improbable that members of the profession entrusted by the State Supreme Court

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[9] See *McClain* v. *Real Estate Bd. of New Orleans*, 444 U. S. 232, 246–247 (1980); *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 397, n. 11 (1979); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974); *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957).

[10] See *Hughes* v. *Rowe*, 449 U. S. 5, 10 (1980) *(per curiam)*; *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972) *(per curiam)*; *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 515–516 (1972); *Jenkins* v. *McKeithen*, 395 U. S. 411, 421 (1969) (plurality opinion); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174–175 (1965).

with a public obligation to administer an examination system that will measure applicants' competence would betray that trust, and secretly subvert that system to serve their private ends. Nevertheless, the probability that respondent will not prevail at trial is no justification for dismissing the complaint. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974). The Court does not purport to justify dismissal of this complaint by reference to the low probability that respondent will prevail at trial. Instead, it substantially broadens the doctrine of antitrust immunity, using an elephant gun to kill a flea.

II

If respondent were challenging a restraint of trade imposed by the sovereign itself, this case would be governed by *Parker* v. *Brown*, 317 U. S. 341 (1943), which held that the Sherman Act does not apply to the sovereign acts of States. See *id.*, at 350–352. As the Court points out, the Arizona Supreme Court exercises sovereign power with respect to admission to the Arizona Bar; hence if the challenged conduct were that of the court, it would be immune under *Parker*. *Ante*, at 567–569.[11] The majority's conclusion that the challenged action was that of the Arizona Supreme Court is, however, plainly wrong. Respondent alleged that the decision to place an artificial limit on the number of lawyers was made by petitioners—not by the State Supreme Court. There is no contention that petitioners made that decision at the direction or behest of the Supreme Court. That court is not a petitioner, nor was it named as a defendant in respondent's complaint. Nor, unlike the Court, have petitioners suggested that the Arizona Supreme Court played any part in establishing the grading standards for the bar examination

[11] See *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 359–360 (1977).

or made any independent decision to admit or reject *any* individual applicant for admission to the Bar.[12] Because respondent is not challenging the conduct of the Arizona Supreme Court, *Parker* is simply inapplicable.

Any possible claim that the challenged conduct is that of the State Supreme Court is squarely foreclosed by *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). There an antitrust action was brought challenging minimum-fee schedules published by a county bar association and enforced by the State Bar pursuant to its mandate from the Virginia Supreme Court to regulate the practice of law in that State. After acknowledging that the State Bar was a state agency which had enforced the schedules pursuant to the authority granted it by the State Supreme Court, we stated a simple test for antitrust immunity:

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State acting as sovereign. Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules *required* the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent

[12] It should be noted that petitioners do not advance the imaginative argument on which this Court's decision rests—that the examination procedure is merely advisory and that the Arizona Supreme Court itself "made the final decision on each applicant." *Ante*, at 578 (footnote omitted). Presumably petitioners are more familiar with how their own procedures work than is this Court. The Court shows precious little deference to "administrative expertise" in its analysis of the facts.

to supply them, or require the type of price floor which arose from respondents' activities." *Id.*, at 790 (emphasis supplied) (citations omitted).

In *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), the Court applied the *Goldfarb* test to a disciplinary rule restricting advertising by Arizona attorneys that the Supreme Court itself "has imposed and enforces," 433 U. S., at 353:

> "In the instant case . . . the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2–101(B). That court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.' 421 U. S., at 791 (footnote omitted)." *Id.*, at 359–360.

The test stated in *Goldfarb* and *Bates* is that the sovereign must *require* the restraint. Indeed, that test is derived from *Parker* itself: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities *directed* by its legislature [or supreme court]." 317 U. S., at 350–351 (emphasis supplied). Here, the sovereign is the State Supreme Court, not petitioners, and the court did not require petitioners to grade the bar examination as they did.[13] The fact that petitioners are part of a state agency under the direction of the sovereign is insufficient to cloak them in the sovereign's immunity; that much was also decided in *Goldfarb:*

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[13] It is not surprising that petitioners (who must practice before the Arizona Supreme Court) did not advance the theory on which this Court relies—that their challenged conduct is actually conduct of the Arizona Supreme Court. They surely understand that they are not the court, but rather its subordinate.

> "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." 421 U. S., at 791–792 (footnotes and citation omitted).

"*Goldfarb* therefore made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (plurality opinion). Rather, "anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws." *Id.*, at 411, n. 41. See also *id.*, at 425 (opinion of BURGER, C. J.); *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 604 (1976) (opinion of BURGER, C. J.). An antitrust attack falls under *Parker* only when it challenges a decision of the sovereign and not the decision of the state bar which indisputably is not the sovereign. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 104–105 (1980).[14] Here no decision of the sovereign, the Arizona Supreme Court, is attacked;[15] only a

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[14] See also *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); *Cantor* v. *Detroit Edison Co.*, 428 U. S., at 593–595.

[15] In response to this dissent, the Court has advanced the theory that the relevant "state action" was the State Supreme Court's rejection of an original complaint filed in that court containing a "plethora of charges, including the substance of the complaint in this case." *Ante*, at 576–577. See also *ante*, at 582. Presumably, that complaint was simply deficient as a matter of state law; if the allegations of respondent's current complaint are taken as true then the fact that respondent failed the bar examination would have provided an adequate ground for the dismissal of respondent's complaint without any review of respondent's allegations. Even if it were the case

conspiracy of petitioners which was neither compelled nor directed by the sovereign is at stake. Since there is no claim that the *court* directed petitioners to artificially reduce the number of lawyers in Arizona, petitioners cannot utilize the sovereign's antitrust immunity.[16]

The majority's confused analysis is illustrated by its difficulty in identifying the sovereign conduct which it thinks is at issue here. To support its conclusion that the challenged action is that of the Arizona Supreme Court, the majority suggests that what respondent challenges is the court's decision to deny respondent's application for admission to the Bar. *Ante*, at 577–578, n. 30. I find nothing in the record to indicate that the court ever made such a decision. Respondent's complaint alleges only that petitioners "announced the results" of the bar examination. App. 9. In their answer, petitioners admitted this and added nothing else of significance. *Id.*, at 17. The Rules of the Supreme Court do not call for the court to deny the application of a person who has failed the bar examination; rather they state only that any "applicant aggrieved by any decision of the Committee . . . may within 20 days after such occurrence file a verified pe-

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that the Arizona Supreme Court reviewed petitioner's complaint on its merits, all that would indicate is that the court has declined to exercise its power of revision with respect to petitioners' alleged anticompetitive policies. That is far different from having required petitioners to adopt those policies in the first place, which is what *Goldfarb* requires.

[16] The Court argues that "[o]nly the Arizona Supreme Court had the authority to grant or deny admission to practice in the State," *ante*, at 575–576 (footnote omitted), and therefore concludes that the challenged conduct is that of the court. But there is no allegation that the challenged policy was adopted by the court; at most the court has permitted it by accepting the recommendations of petitioners. Yet as *Bates* and *Goldfarb* make clear, the challenged policy must be required by the sovereign. The fact that the court retained the power to disapprove of the examination procedure adopted by petitioners is no different from the fact that the Virginia Supreme Court retained the power to disapprove of the fee schedules set by the bar association in *Goldfarb*. Similar powers of revision were held insufficient to justify immunity in *Lafayette*, *Cantor*, and *Midcal*.

tition with this Court for a review." Ariz. Sup. Ct. Rule 28(c) XII. Yet the Court disavows reliance on the Supreme Court's denial of Ronwin's petition, *ante*, at 577–578, n. 30,[17] and with good reason, see n. 15, *supra*.[18] Thus, if the Supreme Court did not itself deny Ronwin's application, if its denial of Ronwin's petition for review is irrelevant, and if the only criterion it ever required petitioners to employ was competence, it is difficult to see why petitioners should have immunity from the requirements of federal law if, as alleged, they took the initiative in employing a criterion other than competence. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Goldfarb*, 421 U. S., at 791.

III

It is, of course, true that the Arizona Supreme Court delegated to petitioners the task of administering the bar exam, and retained the authority to review or revise any action taken by petitioners. However, neither of these fac-

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[17] While the majority's disavowal in its note 30 is quite unequivocal, at other points in its opinion, see *ante*, at 576–577, and in its ultimate statement of its holding, see *ante*, at 582, it does seem to rely on the denial of respondent's petition for review. If that truly is critical for the majority, then it would follow that an individual in respondent's position who did not file a petition for review would be able to mount an antitrust challenge free from the immunity barrier the majority erects. If it indeed is that easy to escape the majority's holding, then that holding will not protect bar examiners against the parade of horribles discussed by the majority *ante*, at 580, and n. 34.

[18] The cases the Court cites *ante*, at 577, n. 30, 581, all involve instances in which an applicant who had *passed* the bar examination was nevertheless not recommended for admission. If the applicant seeks judicial review, those cases indicate that the court will decide for itself whether to admit the applicant. However, none of those cases indicates that the court makes an independent decision, or indeed any decision at all, to deny the application of a person who has failed the bar examination.

tors is sufficient to accord petitioners immunity under the Sherman Act.

In *Bates*, the Court held that the State Bar's restrictions on attorney advertising qualified for antitrust immunity, 433 U. S., at 359–362, because "the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker." *Lafayette*, 435 U. S., at 410 (plurality opinion) (footnote omitted). This Court has since "adopted the principle, expressed in the plurality opinion in *Lafayette*, that anticompetitive restraints engaged in by state municipalities or subdivisions must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption." *Community Communications Co.* v. *Boulder*, 455 U. S., at 51, n. 14 (quoting *Midcal*, 445 U. S., at 105).[19]

Here there is nothing approaching a clearly articulated and affirmatively expressed state policy favoring an artificial limit on the number of lawyers licensed to practice in Arizona. Indeed, the majority does not attempt to argue that petitioners satisfy this test. The only articulated policy to be found in Arizona law is that competent lawyers should be admitted to practice; indeed this is the only policy petitioners articulate in this Court. An agreement of the type alleged in respondent's complaint is entirely unrelated to any "clearly articulated and affirmatively expressed" policy of Arizona. While the Arizona Supreme Court may have permitted petitioners to grade and score respondent's bar examination as they did, *Parker* itself indicates that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." 317 U. S., at 351. The Arizona Supreme Court

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[19] See also 455 U. S., at 51–52, 54; *Midcal*, 445 U. S., at 104–105; *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S., at 109.

may permit the challenged restraint, but it has hardly required it as a consequence of some affirmatively expressed and clearly articulated policy. What we said of a state home-rule provision that permitted but did not require municipalities to adopt a challenged restraint on competition applies fully here:

> "[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. . . . Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Boulder*, 455 U. S., at 55–56 (emphasis in original).

Unless the Arizona Supreme Court affirmatively directed petitioners to restrain competition by limiting the number of otherwise qualified lawyers admitted to practice in Arizona, it simply cannot be said that its position is anything more than one of neutrality; mere authorization for anticompetitive conduct is wholly insufficient to satisfy the test for antitrust immunity. See *Midcal*, 445 U. S., at 105–106; *Lafayette*, 435 U. S., at 414–415 (plurality opinion).[20] No

[20] See also *Cantor* v. *Detroit Edison Co.*, 428 U. S., at 604–605 (opinion of BURGER, C. J.). In *Cantor*, the Court wrote:

"Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. Indeed, respondent initiated the program years before the regulatory agency was even created. There is nothing unjust in a conclusion

affirmative decision of the Arizona Supreme Court to restrain competition by limiting the number of qualified persons admitted to the Bar is disclosed on the present record. The alleged conspiracy to introduce a factor other than competence into the bar examination process is not the product of a clearly articulated and affirmatively expressed state policy and hence does not qualify for antitrust immunity.[21]

IV

The conclusion that enough has been alleged in the complaint to survive a motion to dismiss does not warrant the further conclusion that the respondent is likely to prevail at

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that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness." *Id.*, at 594–595 (footnotes omitted).

[21] In this Court petitioners appear to have abandoned the argument, advanced for the first time in a petition for rehearing in the Court of Appeals, that the examination grading formula was actually approved by the State Supreme Court. Because the majority appears to revive this abandoned contention, *ante*, at 572–573, and n. 22, see also *ante*, at 576, it is necessary to address it, though that requires no more than brief reference to the Court of Appeals' opinion:

"Defendants contend for the first time on rehearing that the Committee's grading formula 'was submitted to the Court, reviewed by the Court, and accepted by the Court.' In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c) (VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal

trial, or even that his case is likely to survive a motion for summary judgment. For it is perfectly clear that the admissions policy that is described in the Arizona Supreme Court's Rules does not offend the Sherman Act. Any examination procedure will place a significant barrier to entry into the profession; moreover, a significant measure of discretion must be employed in the administration of testing procedures. Yet ensuring that only the competent are licensed to serve the public is entirely consistent with the Sherman Act. See *Goldfarb*, 421 U. S., at 792–793.[22]

The Court is concerned about the danger that because thousands of aspirants fail to pass bar examinations every year, "affirmance of the Court of Appeals in this case could well invite numerous suits" questioning bar examiners' motives; the Court fears that the burdens of discovery and trial and "the threat of treble damages" will deter "'able citizens' from performing this essential public service." *Ante*, at 580–581, n. 34. The Court is, I submit, unduly alarmed.[23] A

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was therefore improper on the basis of the information before the district court." *Ronwin* v. *State Bar of Arizona*, 686 F. 2d 692, 697 (CA9 1981). It is, of course, equally improper for this Court to rely on evidence not presented to the District Court as a basis for holding that the complaint was not sufficient to withstand a motion to dismiss. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157–158, n. 16 (1970).

[22] See generally *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 348–349 (1982); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 696 (1978).

[23] The majority makes the rather surprising suggestion that under the well-settled principles I have discussed, those who advise state legislatures on legislation which restrains competition could be sued under the Sherman Act. *Ante*, at 580. Such persons of course would have a complete defense since in such a case they would have been delegated no power which could be used to restrain competition and hence cannot be liable for a restraint they did not impose. Moreover, the Sherman Act protects the right to seek favorable legislation, even if the reason for doing so is to injure competitors. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972); *Eastern Railroad Presidents Conference*

denial of antitrust immunity in this case would not necessarily pose any realistic threat of liability, or even of prolonged litigation. Respondent must first produce sufficient evidence that petitioners have indeed abused their public trust to survive summary judgment, a task that no doubt will prove formidable.[24] Moreover, petitioners' motives will not necessarily be relevant to respondent's case. If the proof demonstrates that petitioners have adopted a reasonable means for regulating admission to the Arizona Bar on the basis of competence, respondent will be unable to show the requisite adverse effect on competition even if the subjective motivation of one or more bar examiners was tainted by sinister self-interest. Indeed, even if respondent can show that he was "arbitrarily" denied admission to the Bar for reasons unrelated to his qualifications, unless he can also show that this occurred as part of an anticompetitive scheme, his antitrust claim will fail.

In any event, there is true irony in the Court's reliance on these concerns. In essence, the Court is suggesting that a special protective shield should be provided to lawyers because they—unlike bakers, engineers, or the members of any other craft—may not have sufficient confidence in the ability of our legal system to identify and reject unmeritorious claims to be willing to assume the ordinary risks of litigation associated with the performance of civic responsibilities. I do not share the Court's fear that the administration of bar

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v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The majority's focus on cases not before the Court surely reflects the weakness of its position with respect to the case that is here.

[24] In order to preserve the secrecy of bar examination questions, the test must vary from year to year; after a test has been given, it may become apparent that the anticipated passing grade should be adjusted in order to provide roughly the same measure of competence as was used in prior years. Thus respondent's burden of proving the conspiracy he has alleged requires far more than evidence that petitioners exercised discretion in setting the passing grade after the results were known.

examinations by court-appointed lawyers cannot survive the scrutiny associated with rather ordinary litigation that persons in most other walks of life are expected to endure.

The Court also no doubt believes that lawyers—or at least those leaders of the bar who are asked to serve as bar examiners—will always be faithful to their fiduciary responsibilities. Though I would agree that the presumption is indeed a strong one, nothing in the sweeping language of the Sherman Act justifies carving out rules for lawyers inapplicable to any other profession. In *Goldfarb* we specifically rejected such parochialism. Indeed, the argument that it is unwise or unnecessary to require the petitioners to comply with the Sherman Act "is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Boulder*, 455 U. S., at 56. We should not ignore that commitment today.

Denial of antitrust immunity in this case would hardly leave the State helpless to cope with felt exigencies; should it wish to do so, the Arizona Supreme Court remains free to give petitioners an affirmative direction to engage in the precise conduct that respondent has alleged. The antitrust laws hardly create any inescapable burdens for the State; they simply require that decisions to displace the free market be made overtly by public officials subject to public accountability, rather than secretly in the course of a conspiracy involving representatives of a private guild accountable to the public indirectly if at all. See *id.*, at 56–57; *Lafayette*, 435 U. S., at 416–417 (plurality opinion). "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U. S., at 106.

The practical concerns identified by the Court pale when compared with the principle that should govern the decision

of this case. The rule of law that applies to this case is applicable to countless areas of the economy in which arbitrary restraints on entry may impose the very costs on the consuming public which the antitrust laws were designed to avoid.[25] Experience in the administration of the Sherman Act has demonstrated that there is a real risk that private associations that purport merely to regulate professional standards may in fact use their powers to restrain competition which threatens their members.[26] It is little short of irresponsible to tear a gaping hole in the fabric of antitrust law simply because we may be confident that respondent will be unable to prove what he alleges.

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[25] The conspiracy respondent has alleged, if proved, would have no procompetitive justification at all; it would be plainly inconsistent with the goals of the Sherman Act. Thus petitioners' claim of antitrust immunity arises in the least defensible context:

"[A]s a general proposition . . . state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits. This does not mean that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment. . . . A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed." *Cantor* v. *Detroit Edison Co.*, 428 U. S., at 610–611 (BLACKMUN, J., concurring in judgment).

[26] See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332 (1982); *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556 (1982); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978); *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *American Medical Assn.* v. *United States*, 317 U. S. 519 (1943); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 465–466 (1941).

Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine.[27] Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect petitioners from vexatious litigation, then there is something wrong with those procedures, not with the law of antitrust immunity. That body of law simply does not permit the Sherman Act to be displaced when neither the state legislature nor the state supreme court has expressed any desire to preclude application of the antitrust laws to the conduct of those who stand to benefit from restraints of trade. A healthy respect for state regulatory policy does not require immunizing those who abuse their public trust; such a thin veneer of state involvement is insufficient justification for casting aside the competitive ideal of the Sherman Act. The commitment to free markets and open competition that has evolved over the centuries and is embodied in the Sherman Act should be sturdy enough to withstand petitioners' flimsy claim. That claim might have merited the support of the 14th-century guilds; today it should be accorded the "punishment of the hurdle."

I respectfully dissent.

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[27] If, as seems likely, respondent's claim proves insubstantial, it should be dealt with in the same manner as other such claims—by means of summary judgment, perhaps coupled with an award of attorneys' fees should it also develop that this case was "unreasonably and vexatiously" brought. See 28 U. S. C. § 1927.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* RINGER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1772. Argued February 27, 1984—Decided May 14, 1984

Part A of Title XVIII of the Social Security Act, commonly known as the Medicare Act, provides insurance for the cost of hospital and related posthospital expenses, but precludes reimbursement for services which are not "reasonable and necessary" for the diagnosis or treatment of illness or injury. Judicial review of a claim under the Medicare Act is available only after the Secretary of Health and Human Services renders a "final decision" on the claim in the same manner as is provided in 42 U. S. C. § 405(g) for old-age and disability claims arising under Title II of the Social Security Act. Title 42 U. S. C. § 405(h), to the exclusion of 28 U. S. C. § 1331 (federal-question jurisdiction), makes § 405(g) the sole avenue for judicial review of all "claim[s] arising under" the Medicare Act. Pursuant to her rulemaking authority, the Secretary has provided that a "final decision" is rendered on a Medicare claim only after the claimant has pressed the claim through all designated levels of administrative review. In January 1979, the Secretary issued an administrative instruction to all fiscal intermediaries that no payment is to be made for Medicare claims arising out of a surgical procedure known as bilateral carotid body resection (BCBR) when performed to relieve respiratory distress. Until October 1980, Administrative Law Judges (ALJs), who were not bound by the instruction, consistently ruled in favor of claimants whose BCBR claims had been denied by the intermediaries. The Appeals Council also authorized payment for BCBR Part A expenses in a case involving numerous claimants. On October 28, 1980, the Secretary issued a formal administrative ruling, intended to have a binding effect on the ALJs and the Appeals Council, prohibiting them from ordering Medicare payments for BCBR operations occurring after that date, the Secretary having concluded that the BCBR procedure was not "reasonable and necessary" within the meaning of the Medicare Act. Without having exhausted their administrative remedies, respondents brought an action in Federal District Court challenging the Secretary's instruction and ruling, and relying on 28 U. S. C. § 1331, 28 U. S. C. § 1361 (mandamus against federal official), and 42 U. S. C. § 405(g) to establish jurisdiction. Respondents are four Medicare claimants for whom BCBR surgery was prescribed to relieve pulmonary problems. Three of the respondents (Holmes, Webster-Zieber, and Vescio) had the surgery be-

fore October 28, 1980, and filed claims for reimbursement with the fiscal intermediary, and the fourth respondent (Ringer) never had the surgery, claiming that he was unable to afford it. The complaint sought a declaration that the Secretary's refusal to find that BCBR surgery is "reasonable and necessary" under the Medicare Act is unlawful and an injunction compelling her to instruct her intermediaries to provide payment for BCBR claims and barring her from forcing claimants to pursue administrative appeals in order to obtain payment. The District Court dismissed the complaint for lack of jurisdiction, holding that in essence respondents were claiming entitlement to benefits for the BCBR procedure, that any challenges to the Secretary's procedure were "inextricably intertwined" with respondents' claim for benefits, and that therefore respondents must exhaust their administrative remedies pursuant to § 405(g) before pursuing their action in federal court. The Court of Appeals reversed, holding that to the extent respondents were seeking to invalidate the Secretary's *procedure* for determining entitlement to benefits, those claims were cognizable under the federal-question and mandamus statutes, without the administrative exhaustion requirement of § 405(g). While acknowledging that § 405(g) with its exhaustion requirement provides the only jurisdictional basis for seeking judicial review of claims for benefits, the court nonetheless held that the District Court erred in requiring respondents to exhaust their administrative remedies, since exhaustion would be futile and might not fully compensate respondents for their asserted injuries in view of the fact that they sought payment without the prejudice—and the necessity of appeal—resulting from the existence of the Secretary's instruction and ruling.

Held:

1. Exhaustion of administrative remedies is in no sense futile for respondents Holmes, Webster-Zieber, and Vescio, and they, therefore, must adhere to the administrative procedure that Congress has established for adjudicating their Medicare claims. Pp. 613–619.

(a) The Court of Appeals erred in concluding that any portion of these respondents' claims could be channeled into federal court by way of federal-question jurisdiction. The inquiry in determining whether § 405(h) bars federal-question jurisdiction must be whether the claim "arises under" the Medicare Act, not whether it lends itself to a "substantive" rather than a "procedural" label. Here, all aspects of these respondents' challenge to the Secretary's BCBR payment policy "aris[e] under" the Medicare Act. Pp. 613–616.

(b) Assuming without deciding that § 405(h) does not foreclose mandamus jurisdiction in all Social Security Act cases, the District Court did not err in dismissing respondents' complaint because no writ of mandamus could properly issue. Title 28 U. S. C. § 1361 is intended to provide a remedy only if the plaintiff has exhausted all other avenues of

relief and only if the defendant owes him a nondiscretionary duty. Here, the above respondents clearly have an adequate remedy under § 405(g) for challenging all aspects of the Secretary's denial of their claims, and thus § 405(g) is the only avenue for judicial review of their claims. While these respondents satisfied the nonwaivable requirement of presenting a claim to the Secretary, they did not satisfy the waivable requirement that administrative remedies be exhausted. Pp. 616–619.

2. The District Court had no jurisdiction as to respondent Ringer. His claim is essentially one requesting the payment of benefits for BCBR surgery, a claim cognizable only under § 405(g). Mandamus jurisdiction is unavailable to him for the same reasons it is unavailable to the other respondents. Regarding federal-question jurisdiction, as with the other respondents, all aspects of Ringer's claim "aris[e] under" the Medicare Act. He must pursue his claim under § 405(g) in the same manner that Congress has provided. Because he has not given the Secretary an opportunity to rule on a concrete claim for reimbursement, he has not satisfied the nonwaivable exhaustion requirement of § 405(g). Pp. 620–626.

697 F. 2d 1291, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 627.

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *Anthony J. Steinmeyer*, and *Margaret E. Clark*.

Malcolm J. Harkins III argued the cause for respondents. With him on the brief were *Joseph E. Casson* and *Joseph L. Bianculli*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are individual Medicare claimants who raise various challenges to the policy of the Secretary of Health and Human Services (Secretary) as to the payment of Medi-

**Eileen P. Sweeney* and *Sally Hart Wilson* filed a brief for the Alliance of Social Security Disability Recipients et al. as *amici curiae* urging affirmance.

care benefits for a surgical procedure known as bilateral carotid body resection (BCBR). The United States District Court for the Central District of California dismissed the action for lack of jurisdiction, finding that in essence respondents are claiming entitlement to benefits for the BCBR procedure and therefore must exhaust their administrative remedies pursuant to 42 U. S. C. § 405(g), before pursuing their action in federal court. The Court of Appeals for the Ninth Circuit reversed and remanded for consideration on the merits. 697 F. 2d 1291 (1982). We granted certiorari to sort out the thorny jurisdictional problems which respondents' claims present, 463 U. S. 1206 (1983), and we now reverse as to all respondents.

I

Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U. S. C. § 1395 *et seq.*, commonly known as the Medicare Act, establishes a federally subsidized health insurance program to be administered by the Secretary. Part A of the Act, 42 U. S. C. § 1395c *et seq.*, provides insurance for the cost of hospital and related posthospital services, but the Act precludes reimbursement for any "items or services . . . which are not reasonable and necessary for the diagnosis or treatment of illness or injury." § 1395y(a)(1). The Medicare Act authorizes the Secretary to determine what claims are covered by the Act "in accordance with the regulations prescribed by him." § 1395ff(a). Judicial review of claims arising under the Medicare Act is available only after the Secretary renders a "final decision" on the claim, in the same manner as is provided in 42 U. S. C. § 405(g)[1] for old age and disability claims arising under Title II of the Social Security Act. 42 U. S. C. § 1395ff(b)(1)(C).

[1] Title 42 U. S. C. § 405(g) provides in part as follows:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in

Pursuant to her rulemaking authority, see 42 U. S. C. §§ 1395hh, 1395ii (incorporating 42 U. S. C. § 405(a)), the Secretary has provided that a "final decision" is rendered on a Medicare claim only after the individual claimant has pressed his claim through all designated levels of administrative review.[2] First, the Medicare Act authorizes the Secretary to enter into contracts with fiscal intermediaries providing that the latter will determine whether a particular medical service is covered by Part A, and if so, the amount of the reimbursable expense for that service. 42 U. S. C. § 1395h; 42 CFR § 405.702 (1983). If the intermediary determines that a particular service is not covered under Part A, the claimant can seek reconsideration by the Health Care Financing Administration (HCFA) in the Department of Health and Human Services. 42 CFR §§ 405.710–405.716 (1983). If denial of the claim is affirmed after reconsideration and if the claim exceeds $100, the claimant is entitled to a hearing before an administrative law judge (ALJ) in the same manner as is provided for claimants under Title II of the Act. 42 U. S. C. §§ 1395ff(b)(1)(C), (b)(2); 42 CFR § 405.720 (1983).

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the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

[2]The Secretary has recognized one exception which is not applicable here. She has provided by regulation that when the facts and her interpretation of the law are not in dispute and when the only factor precluding an award of benefits is a statutory provision which the claimant challenges as unconstitutional, the claimant need not exhaust his administrative remedies beyond the reconsideration stage. 42 CFR §§ 405.718–405.718e (1983); 20 CFR §§ 404.923–404.928 (1983).

If the claim is again denied, the claimant may seek review in the Appeals Council. 42 CFR §§ 405.701(c), 405.724 (1983) (incorporating 20 CFR § 404.967 (1983)). If the Appeals Council also denies the claim and if the claim exceeds $1,000, only then may the claimant seek judicial review in federal district court of the "Secretary's final decision." 42 U. S. C. §§ 1395ff(b)(1)(C), (b)(2).

In January 1979, the Secretary through the HCFA issued an administrative instruction to all fiscal intermediaries, instructing them that no payment is to be made for Medicare claims arising out of the BCBR surgical procedure when performed to relieve respiratory distress. See 45 Fed. Reg. 71431–71432 (1980) (reproducing the instruction).[3] Relying on information from the Public Health Service and a special Task Force of the National Heart, Lung and Blood Institute of the National Institutes of Health, *id.*, at 71426, the HCFA explained that BCBR has been "shown to lack [the] general acceptance of the professional medical community" and that "controlled clinical studies establishing the safety and effectiveness of this procedure are needed." *Id.*, at 71431. It concluded that the procedure "must be considered investigational" and not "reasonable and necessary" within the meaning of the Medicare Act. *Ibid.*

Many claimants whose BCBR claims were denied by the intermediaries as a result of the instruction sought review of the denial before ALJs, who were not bound by the Secretary's instructions to the intermediaries. Until October

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[3] BCBR, first performed in this country in the 1960's, involves the surgical removal of the carotid bodies, structures the size of a rice grain which are located in the neck and which control the diameter of the bronchial tubes. Proponents of the procedure claim that it reduces the symptoms of pulmonary diseases such as asthma, bronchitis, and emphysema. Although the Secretary concluded that BCBR for that purpose is not "reasonable and necessary" within the meaning of the Medicare Act, she did note that the medical community had accepted the procedure as effective for another purpose, the removal of a carotid body tumor in the neck. 45 Fed. Reg. 71431 (1980).

1980, ALJs were consistently ruling in favor of individual BCBR claimants. The Appeals Council also authorized payment for BCRB Part A expenses in a consolidated case involving numerous claimants, see *In re Ferguson*, No. 126–12–3830 (HHS Appeals Council, Oct. 18, 1979), while stressing that its decision applied only to the claimants involved in that case and was not to be cited as precedent in future cases.

In response to the rulings of the ALJs and the Appeals Council, on October 28, 1980, the Secretary through the HCFA issued a formal administrative ruling, intended to have binding effect on the ALJs and the Appeals Council, see 20 CFR § 422.408 (1983), prohibiting them in all individual cases from ordering Medicare payments for BCBR operations occurring after that date. 45 Fed. Reg. 71426–71427 (1980). In the ruling the Secretary noted that she had examined the proceedings in *In re Ferguson*, had consulted with the Public Health Service, and again had concluded that the BCBR procedure was not "reasonable and necessary" within the meaning of the Medicare Act. *Ibid.*

On September 18, 1980, respondents in this case filed a complaint in the District Court for the Central District of California, raising numerous challenges focused on the Secretary's January 1979 instructions to her intermediaries precluding payment for BCBR surgery.[4] On November 7, 1980,

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[4] Respondents objected to the denial of reimbursement for Part B as well as the Part A expenses of BCBR surgery. Part B of the Medicare Act, 42 U. S. C. § 1395j *et seq.*, establishes a voluntary program of supplemental medical insurance covering expenses not covered by the Part A program, such as reasonable charges for physicians' services, medical supplies, and laboratory tests. Payments for Part B expenses are made by private insurance carriers under contract to the Department of Health and Human Services, 42 U. S. C. § 1395u, and the claimant is entitled to reconsideration of the carrier's initial denial of those claims. 42 CFR §§ 405.807–405.860 (1983). Congress has not, however, provided for judicial review of the denial of Part B claims. See *Schweiker* v. *McClure*, 456 U. S. 188 (1982); *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982). Thus respond-

after the Secretary issued the formal ruling binding on the ALJs and the Appeals Council as well as the intermediaries, respondents amended their complaint to challenge that ruling as well. Respondents relied on 28 U. S. C. § 1331 (federal question), 28 U. S. C. § 1361 (mandamus against a federal official), and 42 U. S. C. § 405(g) (Social Security Act), to establish jurisdiction in the District Court.

The individuals named in the amended complaint, who are respondents before this Court,[5] are four individual Medicare claimants. Their physician, Dr. Benjamin Winter,[6] who has developed a special technique for performing BCBR surgery and who has performed the surgery over 1,000 times, prescribed BCBR surgery for all four respondents to relieve their pulmonary problems. Respondents Sanford Holmes, Norman Webster-Zieber, and Jean Vescio had the surgery before October 28, 1980, and all three filed a claim for reimbursement with their fiscal intermediary. At the time

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ents seem to concede that to the extent that their claims are characterized as claims for Part B benefits, there is no judicial review of those claims under *McClure* and *Erika*. Brief for Respondents 1, n. 1. Respondents do argue, however, that to the extent that their claims can be characterized as collateral constitutional challenges, see n. 7, *infra*, those constitutional challenges are properly before us. In light of our characterization of respondents' claims essentially as claims for benefits, see text at 614, and the fact that whatever constitutional claims respondents assert are clearly too insubstantial to support subject-matter jurisdiction, see *Hagans* v. *Lavine*, 415 U. S. 528, 536–538 (1974), we view this case as involving only respondents' Part A claims.

[5] Respondents requested certification of a class, App. 12, but the District Court dismissed the complaint before ruling on the class certification question.

[6] Dr. Winter is also named as a plaintiff in the amended complaint, but he is pressing no claims on his own behalf before this Court, serving instead as a representative of BCBR claimants pursuant to 20 CFR § 404.1700 *et seq.* (1983); Brief for Respondents 6, n. 4. Because we find that there is no jurisdiction as to the BCBR claimants whose claims are before this Court, there is of course no jurisdiction as to their representative, Dr. Winter.

that the amended complaint was filed, none of the three had exhausted their administrative remedies, and thus none had received a "final decision" on their claims for benefits from the Secretary. The fourth respondent, Freeman Ringer, informally inquired of the Secretary and learned that BCBR surgery is not covered under the Medicare Act. Thus he has never had the surgery, claiming that he is unable to afford it. App. 32.

The essence of their amended complaint is that the Secretary has a constitutional and statutory obligation to provide payment for BCBR surgery because overwhelmingly her ALJs have ordered payment when they have considered individual BCBR claims. *Id.*, at 9–10. According to the complaint, the Secretary's instructions to the contrary to her intermediaries violate constitutional due process and numerous statutory provisions in that they force eligible Medicare claimants who have had BCBR surgery to pursue individual administrative appeals in order to get payment, even though ALJs overwhelmingly have determined that payment is appropriate. *Id.*, at 16–22. Regarding the Secretary's formal administrative ruling, the complaint asserts that the ruling merely reaffirms the instructions and creates an "additional administrative barrier" to Medicare beneficiaries desiring the BCBR treatment, and that it also is unlawful on numerous substantive and procedural grounds. *Id.*, at 23–25.[7] The

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[7] In particular respondents contend that the instructions and the formal ruling barring payment for BCBR surgery violate the requirement in 42 U. S. C. § 1395y(a)(1) that payment be made for "reasonable and necessary" medical services and that the policy is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U. S. C. § 706(2), under the provision in 42 U. S. C. § 405(a) authorizing the Secretary to issue "reasonable" rules, and under the Due Process Clause of the Fifth Amendment. They contend that requiring them to pursue administrative remedies in order to obtain BCBR payment violates their rights to prompt administrative action under 5 U. S. C. § 555(b) and § 706(2)(A). Finally, they argue that the Secretary violated the rulemaking requirements of the APA, 5 U. S. C. § 553, in issuing the 1979 instructions and the 1980 formal

complaint seeks a declaration that the Secretary's refusal to find that BCBR surgery is "reasonable and necessary" under the Act is unlawful, an injunction compelling the Secretary to instruct her intermediaries to provide payment for BCBR claims, and an injunction barring the Secretary from forcing claimants to pursue individual administrative appeals in order to obtain payment. *Id.*, at 9–10, 25–27.

The District Court dismissed the complaint in its entirety for lack of jurisdiction.[8] It concluded that "[t]he essence of [respondents' claim] . . . is a claim of entitlement [to] benefits for the BCBR procedure," and that any challenges respondents raise to the Secretary's procedures are "inextricably intertwined" with their claim for benefits. App. to Pet. for Cert. 14a. Thus the court concluded that 42 U. S. C. § 405(g) with its administrative exhaustion prerequisite provides the sole avenue for judicial review. Relying on our decision in *Mathews* v. *Eldridge*, 424 U. S. 319, 330–332 (1976), the court concluded that none of respondents' claims are so "collateral" to their overall claim for benefits that the

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ruling. The complaint also stated objections, not pressed before this Court, to the assignment of BCBR claims to an ALJ other than the one who usually considers Dr. Winter's patients' claims, and to the Secretary's assertion of control over the practice of medicine allegedly in violation of constitutional and statutory provisions.

[8] *Amici* point out that the District Court failed to grant respondents leave to amend their complaint to challenge the formal ruling, and that the District Court did not in fact consider the issues raised in the amended complaint. Brief for the Alliance of Social Security Disability Recipients and the Gray Panthers as *Amici Curiae* 7–8, n. 1. The amended complaint, however, merely attacked the new ruling on the same grounds as had been asserted to attack the instructions, and the District Court's finding of no jurisdiction fairly can be read to apply to the issues raised in the amended complaint as well. It is unclear whether respondents contested the District Court's apparent failure formally to grant the amendment, but in any event, the Court of Appeals explicitly considered the issues raised in the amended complaint. The Solicitor General has not objected in this Court to the Court of Appeals' nor to our consideration of those issues, and we will thus regard any possible objection to have been waived.

exhaustion requirement should be waived as to those claims. Because none of the named respondents have satisfied the exhaustion prerequisite of § 405(g), the court dismissed the complaint.

On appeal the Court of Appeals for the Ninth Circuit reversed. It concluded that the thrust of respondents' claim is that "the Secretary's presumptive rule that the BCBR operation is not reasonable and necessary was an unlawful administrative mechanism for determining awards of benefits." 697 F. 2d, at 1294. The Court of Appeals concluded that to the extent that respondents are seeking to invalidate the Secretary's *procedure* for determining entitlement to benefits, those claims are cognizable without the requirement of administrative exhaustion under the federal-question statute, 28 U. S. C. § 1331, and the mandamus statute, 28 U. S. C. § 1361. 697 F. 2d, at 1294.

The Court of Appeals agreed with the District Court that respondents also had raised *substantive* claims for benefits, in that they had sought an injunction requiring the Secretary to declare that BCBR is reasonable and necessary under the Act. In the Court of Appeals' view, the fact that respondents had not sought an actual award of benefits in their complaint did not alter the court's characterization of a portion of their claim as essentially a claim for benefits. *Ibid.* Acknowledging that § 405(g) with its exhaustion prerequisite provides the only jurisdictional basis for seeking judicial review of claims for benefits, the court nonetheless concluded that the District Court had erred in requiring respondents to exhaust their administrative remedies in this case. Relying on our opinions in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), and *Mathews* v. *Eldridge*, *supra*, the Court of Appeals concluded that exhaustion would be futile for respondents and that it may not fully compensate them for the injuries they assert because they seek payment without the prejudice—and the necessity of appeal—resulting from the existence of the instructions and the rule. 697 F. 2d, at 1294–1296. Because we disagree with the Court of Appeals' characteriza-

tion of the claims at issue in this case and its reading of our precedents, we now reverse.

II

Preliminarily, we must point out that, although the Court of Appeals seemed not to have distinguished them, there are in fact two groups of respondents in this case. Respondents Holmes, Vescio, and Webster-Zieber constitute one group of respondents, those who have had BCBR surgery before October 28, 1980, and who have requested reimbursement at some, but not all, levels of the administrative process. Although the Court of Appeals did not seem to realize it, there is no dispute that the Secretary's formal administrative ruling simply does not apply to those three respondents' claims for reimbursement for their BCBR surgery.[9] Their claims only make sense then if they are understood as challenges to the Secretary's instructions to her intermediaries, instructions which resulted in those respondents' having to pursue administrative remedies in order to get payment. They have standing to challenge the formal ruling as well only because, construing their complaint liberally, they argue that the existence of the formal rule creates a presumption

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[9] The Secretary's formal ruling states:

"*Effective Date:* As explained above, we have previously issued [a] policy in manual instructions excluding this service from Medicare coverage. However, since ALJs and the Appeals Council have ruled in several cases that claims for these services are payable, it is possible that some beneficiaries, relying on these rulings, have proceeded to have the operation performed in expectation of Medicare payment. In fairness to those beneficiaries, we are making the ruling effective for services furnished after the date of publication [October 28, 1980]." 45 Fed. Reg. 71427 (1980).

One ALJ already expressly has held that the regulation is inapplicable to claimants whose BCBR surgery was performed before October 28, 1980. *In re Benjamin Winter, M. D., Representative for 132 Claimants* (SSA Office Hearing App., Feb. 27, 1982). Dr. Winter pursued that case administratively during the pendency of this litigation on behalf of several of the named respondents and other BCBR claimants. See n. 12, *infra*. See also Tr. of Oral Arg. 16–17.

against payment of their claims in the administrative process, even though the rule does not directly apply to bar their claims. The relief respondents request is that the Secretary change her policy so as to allow payment for BCBR surgery so that respondents simply will not have to resort to the administrative process.

It seems to us that it makes no sense to construe the claims of those three respondents as anything more than, at bottom, a claim that they should be paid for their BCBR surgery. Arguably respondents do assert objections to the Secretary's "procedure" for reaching her decision—for example, they challenge her decision to issue a generally applicable rule rather than to allow individual adjudication, and they challenge her alleged failure to comply with the rulemaking requirements of the APA in issuing the instructions and the rule. We agree with the District Court, however, that those claims are "inextricably intertwined" with respondents' claims for benefits. Indeed the relief that respondents seek to redress their supposed "procedural" objections is the invalidation of the Secretary's current policy and a "substantive" declaration from her that the expenses of BCBR surgery are reimbursable under the Medicare Act. We conclude that all aspects of respondents' claim for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits. We, therefore, disagree with the Court of Appeals' separation of the particular claims here into "substantive" and "procedural" elements. We disagree in particular with its apparent conclusion that simply because a claim somehow can be construed as "procedural," it is cognizable in federal district court by way of federal-question jurisdiction.

The third sentence of 42 U. S. C. § 405(h),[10] made applicable to the Medicare Act by 42 U. S. C. § 1395ii, provides

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[10] That provision reads as follows:

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to the hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal,

that § 405(g), to the exclusion of 28 U. S. C. § 1331, is the sole avenue for judicial review for all "claim[s] arising under" the Medicare Act. See *Weinberger* v. *Salfi*, *supra*, at 760–761. Thus, to be true to the language of the statute, the inquiry in determining whether § 405(h) bars federal-question jurisdiction must be whether the claim "arises under" the Act, not whether it lends itself to a "substantive" rather than a "procedural" label. See *Mathews* v. *Eldridge*, 424 U. S., at 327 (recognizing that federal-question jurisdiction is barred by 42 U. S. C. § 405(h) even in a case where claimant is challenging the administrative *procedures* used to terminate welfare benefits).

In *Weinberger* v. *Salfi*, *supra*, at 760–761, we construed the "claim arising under" language quite broadly to include any claims in which "both the standing and the substantive basis for the presentation" of the claims is the Social Security Act. In that case we held that a constitutional challenge to the duration-of-relationship eligibility statute pursuant to which the claimant had been denied benefits, was a "claim arising under" Title II of the Social Security Act within the meaning of 42 U. S. C. § 405(h), even though we recognized that it was in one sense also a claim arising under the Constitution.

Under that broad test, we have no trouble concluding that all aspects of respondents Holmes', Vescio's, and Webster-Zieber's challenge to the Secretary's BCBR payment policy "aris[e] under" the Medicare Act. It is of no importance that respondents here, unlike the claimants in *Weinberger* v. *Salfi*, sought only declaratory and injunctive relief and not an actual award of benefits as well. Following the declaration which respondents seek from the Secretary—that BCBR surgery is a covered service—only essentially ministerial details will remain before respondents would receive reimburse-

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or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 42 U. S. C. § 405(h).

ment. Had our holding in *Weinberger* v. *Salfi* turned on the fact that claimants there did seek retroactive benefits, we might well have done as the dissent in that case suggested and held that § 405(h) barred federal-question jurisdiction only over claimants' specific request for benefits, and not over claimants' declaratory and injunctive claims as well. See 422 U. S., at 798–799, and n. 13 (BRENNAN, J., dissenting). Thus we hold that the Court of Appeals erred in concluding that any portion of Holmes', Vescio's, or Webster-Zieber's claims here can be channeled into federal court by way of federal-question jurisdiction.

The Court of Appeals also relied on the mandamus statute as a basis for finding jurisdiction over a portion of those three respondents' claims. We have on numerous occasions declined to decide whether the third sentence of § 405(h) bars mandamus jurisdiction over claims arising under the Social Security Act, either because we have determined that jurisdiction was otherwise available under § 405(g), see *Califano* v. *Yamasaki*, 442 U. S. 682, 698 (1979); *Mathews* v. *Eldridge*, *supra*, at 332, n. 12, or because we have determined that the merits of the mandamus claim were clearly insubstantial, *Norton* v. *Mathews*, 427 U. S. 524, 528–533 (1976). We need not decide the effect of the third sentence of § 405(h) on the availability of mandamus jurisdiction in Social Security cases here either.

Assuming without deciding that the third sentence of § 405(h) does not foreclose mandamus jurisdiction in all Social Security cases, see generally *Dietsch* v. *Schweiker*, 700 F. 2d 865, 867–868 (CA2 1983); *Ellis* v. *Blum*, 643 F. 2d 68, 78–82 (CA2 1981), the District Court did not err in dismissing respondents' complaint here because it is clear that no writ of mandamus could properly issue in this case. The common-law writ of mandamus, as codified in 28 U. S. C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty. See *Kerr* v. *United*

States District Court, 426 U. S. 394, 402–403 (1976) (discussing 28 U. S. C. § 1651); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543–544 (1937).

Here respondents clearly have an adequate remedy in § 405(g) for challenging all aspects of the Secretary's denial of their claims for payment for the BCBR surgery, including any objections they have to the instructions or to the ruling if either ultimately should play a part in the Secretary's denial of their claims. The Secretary's decision as to whether a particular medical service is "reasonable and necessary" and the means by which she implements her decision, whether by promulgating a generally applicable rule or by allowing individual adjudication, are clearly discretionary decisions. See 42 U. S. C. § 1395ff(a); see also *Heckler* v. *Campbell*, 461 U. S. 458, 467 (1983).

Thus § 405(g) is the only avenue for judicial review of respondents' Holmes', Vescio's, and Webster-Zieber's claims for benefits, and, when their complaint was filed in District Court, each had failed to satisfy the exhaustion requirement that is a prerequisite to jurisdiction under that provision. We have previously explained that the exhaustion requirement of § 405(g) consists of a nonwaivable requirement that a "claim for benefits shall have been presented to the Secretary," *Mathews* v. *Eldridge*, 424 U. S., at 328, and a waivable requirement that the administrative remedies prescribed by the Secretary be pursued fully by the claimant. *Ibid.* All three respondents satisfied the nonwaivable requirement by presenting a claim for reimbursement for the expenses of their BCBR surgery, but none satisfied the waivable requirement.

Respondents urge us to hold them excused from further exhaustion and to hold that the District Court could have properly exercised jurisdiction over their claims under § 405(g). We have held that the Secretary herself may waive the exhaustion requirement when she deems further exhaustion futile, *Mathews* v. *Diaz*, 426 U. S. 67, 76–77 (1976);

Weinberger v. *Salfi*, 422 U. S., at 766–767. We have also recognized that in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate. We held that *Mathews* v. *Eldridge*, *supra*, at 330–332, was such a case, where the plaintiff asserted a procedural challenge to the Secretary's denial of a pretermination hearing, a claim that was wholly "collateral" to his claim for benefits, and where he made a colorable showing that his injury could not be remedied by the retroactive payment of benefits after exhaustion of his administrative remedies.

The latter exception to exhaustion is inapplicable here where respondents do not raise a claim that is wholly "collateral" to their claim for benefits under the Act, and where they have no colorable claim that an erroneous denial of BCBR benefits in the early stages of the administrative process will injure them in a way that cannot be remedied by the later payment of benefits. And here, it cannot be said that the Secretary has in any sense waived further exhaustion. In the face of the Secretary's vigorous disagreement, the Court of Appeals concluded that the Secretary's formal ruling denying payment for BCBR claims rendered further exhaustion by respondents futile. But as we have pointed out above, the administrative ruling is not even applicable to respondents' claims because they had their surgery before October 28, 1980. We therefore agree with the Secretary that exhaustion is in no sense futile for these three respondents and that the Court of Appeals erred in second-guessing the Secretary's judgment.[11]

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[11] Respondents' reliance on *Mathews* v. *Diaz*, 426 U. S. 67 (1976), is unavailing. In that case, plaintiffs challenged the constitutionality of the duration of residency requirement for enrollment in the Part B Medicare Program. We concluded that the Secretary had waived further exhaustion because he had stipulated that the plaintiffs' applications would be denied on the basis of the challenged provision, and because he had stipulated that the only issue before the courts was the constitutionality of the

Respondents also argue that there would be a presumption against them as they pursue their administrative appeals because of the very existence of the Secretary's instructions and her formal ruling and thus that exhaustion would not fully vindicate their claims. The history of this litigation as recited to us by respondents belies that conclusion. Indeed, according to respondents themselves, in every one of 170 claims filed with ALJs between the time of the Secretary's instructions to her intermediaries and the filing of this lawsuit, before the formal ruling became effective, ALJs allowed recovery for BCBR claims. Brief for Respondents 3. In promulgating the formal ruling, the Secretary took pains to exempt from the scope of the ruling individuals in respondents' position who may have had the surgery relying on the favorable ALJ rulings. 45 Fed. Reg. 71427 (1980). Although respondents would clearly prefer an immediate appeal to the District Court rather than the often lengthy administrative review process, exhaustion of administrative remedies is in no sense futile for these respondents, and they, therefore, must adhere to the administrative procedure which Congress has established for adjudicating their Medicare claims.[12]

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provision, an issue beyond the Secretary's competence. *Id.*, at 76–77. Here, however, the disputed question of coverage for BCBR surgery is peculiarly within the Secretary's competence, and the formal ruling, which respondents liken to the stipulated denial of plaintiffs' applications in *Diaz*, is not even applicable to their claims.

[12] We noted in *Weinberger* v. *Salfi*, 422 U. S. 749, 765 (1975), that the purpose of the exhaustion requirement is to prevent "premature interference with agency processes" and to give the agency a chance "to compile a record which is adequate for judicial review." This case aptly demonstrates the wisdom of Congress' exhaustion scheme. Several respondents in this case pursued their administrative remedies during the pendency of this litigation, see n. 9, *supra*, and the claims of respondents Holmes and Webster-Zieber were denied on grounds not even related to the instructions and rule which they now seek to challenge in federal court. Further, the ALJ determined that the formal rule was not even applicable to re-

III

Respondent Ringer is in a separate group from the other three respondents in this case. He raises the same challenges to the instructions and to the formal ruling as are raised by the other respondents. His position is different from theirs, however, because he wishes to have the operation and claims that the Secretary's refusal to allow payment for it precludes him from doing so. Because Ringer's surgery, if he ultimately chooses to have it, would occur after the effective date of the formal ruling, Ringer's claim for reimbursement, unlike that of the others, would be covered by the formal ruling. Ringer insists that, just as in the case of the other three respondents, the only relief that will vindicate his claim is a declaration that the formal ruling, and presumably the instructions as well, are invalid and an injunction compelling the Secretary to conclude that BCBR surgery is "reasonable and necessary" within the meaning of the Medicare Act. It is only after that declaration and injunction, Ringer insists, that he will be assured of payment and thus only then that he will be able to have the operation.

Again, regardless of any arguably procedural components, we see Ringer's claim as essentially one requesting the payment of benefits for BCBR surgery, a claim cognizable only under § 405(g). Our discussion of the unavailabilty of mandamus jurisdiction over the claims of the other three respondents is equally applicable to Ringer. As to § 1331 jurisdiction, as with the other three respondents, all aspects of Ringer's claim "aris[e] under" the Medicare Act in that the Medicare Act provides both the substance and the standing for Ringer's claim, *Weinberger* v. *Salfi*, 422 U.S., at 760–761. Thus, consistent with our decision with respect to the other three respondents, we hold that §§ 1331 and 1361 are not

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spondent Vescio's claim because of the date of her surgery, and he thus concluded that additional evidence was necessary to determine whether she was entitled to payment.

available as jurisdictional bases for vindicating Ringer's claim.

Ringer's situation does differ from that of the other three respondents in one arguably significant way. Because he has not yet had the operation and thus has no reimbursable expenses, it can be argued that Ringer does not yet have a "claim" to present to the Secretary and thus that he does not have a "claim arising under" the Medicare Act so as to be subject to § 405(h)'s bar to federal-question jurisdiction. The argument is not that Ringer's claim does not "arise under" the Medicare Act as we interpreted that term in *Weinberger* v. *Salfi;* it is rather that it has not yet blossomed into a "claim" cognizable under § 405(g). We find that argument superficially appealing but ultimately unavailing.

Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he ultimately decide to proceed with BCBR surgery. See *Attorney Registration & Disciplinary Comm'n* v. *Schweiker*, 715 F. 2d 282, 287 (CA7 1983). The claim for future benefits must be construed as a "claim arising under" the Medicare Act because any other construction would allow claimants substantially to undercut Congress' carefully crafted scheme for administering the Medicare Act.

If we allow claimants in Ringer's position to challenge in federal court the Secretary's determination, embodied in her rule, that BCBR surgery is not a covered service, we would be inviting them to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question. *Ibid.* Congress clearly foreclosed the possibility of obtaining such advisory opinions from the Secretary herself, requiring instead that a claim could be filed for her scrutiny only after the medical service for which payment is sought has been furnished. See 42 U. S. C. §§ 1395d(a), 1395f(a); 42 CFR §§ 405.1662–495.1667 (1983). Under the

guise of interpreting the language of § 405(h), we refuse to undercut that choice by allowing federal judges to issue such advisory opinions. Thus it is not the case that Ringer has no "claim" cognizable under § 405(g); it is that he must pursue his claim under that section in the manner which Congress has provided. Because Ringer has not given the Secretary an opportunity to rule on a concrete claim for reimbursement, he has not satisfied the nonwaivable exhaustion requirement of § 405(g). The District Court, therefore, had no jurisdiction as to respondent Ringer.

With respect to our holding that there is no jurisdiction pursuant to § 1331, the dissent argues that § 405(h) is not a bar to § 1331 jurisdiction because Ringer's challenge to the Secretary's rule is "arising under" the Administrative Procedure Act, not the Medicare Act. *Post*, at 633. But the dissent merely resurrects an old argument that has already been raised and rejected before by this Court in *Weinberger* v. *Salfi*, *supra*. As we have already noted earlier, *supra*, at 615, the Court rejected the argument that the claimant in *Salfi* could bring his constitutional challenge to a Social Security Act provision in federal court pursuant to § 1331 because the claim was "arising under" the Constitution, not the Social Security Act. Ringer's claim may well "aris[e] under" the APA in the same sense that Salfi's claim arose under the Constitution, but we held in *Salfi* that the constitutional claim was nonetheless barred by § 405(h). It would be anomalous indeed for this Court to breathe life into the dissent's already discredited statutory argument in order to give greater solicitude to an APA claim than the Court thought the statute allowed it to give to the *constitutional* claim in *Salfi*.

The dissent suggests that *Salfi* is distinguishable on two grounds. First, it seems to suggest that *Salfi* is distinguishable because, after rejecting the claim that there was jurisdiction under § 1331, the Court in *Salfi* went on to conclude that there was jurisdiction under § 405(g). *Post*, at 633–635. We fail to see how the Court's conclusion that the claimants in *Salfi* had satisfied all of the prerequisites to jurisdiction

under § 405(g) has anything at all to do with the proper construction of § 405(h). If the dissent is suggesting that the meaning of § 405(h) somehow shifts depending on whether a court finds that the waivable and nonwaivable requirements of § 405(g) are met in any given case, that suggestion is simply untenable.

Second, the dissent seems to suggest that *Salfi* is distinguishable because the claimants there appended a claim for benefits to their claim for declaratory and injunctive relief as to the unconstitutionality of the statute. *Post*, at 635–637. Again, as we have already pointed out in text, *supra*, at 615–616, there is no indication in *Salfi* that our holding in any way depended on the fact that the claimants there sought an award of benefits. Furthermore, today we explicitly hold that our conclusion that the claims of Holmes, Vescio, and Webster-Zieber are barred by § 405(h) is in no way affected by the fact that those respondents did not seek an award of benefits. *Supra*, at 615–616. If the dissent finds that the fact that Ringer does not expressly ask that he be paid benefits for his future surgery[13] is crucial to its conclusion that his claims are not barred under § 405(h), it is difficult to see why the dissent also does not conclude that the claims of the other three respondents are not barred by § 405(h) for the same reason.

The crux of the dissent's position as to § 1331 jurisdiction then seems to be that Ringer's claims do not "arise under" the Medicare Act so as to be barred by § 405(h) because Ringer and his surgeon have not yet filed, and indeed cannot yet file, a concrete claim for reimbursement because Ringer has not yet had BCBR surgery. Thus, in the dissent's view, if a clamaint wishes to claim entitlement to benefits in ad-

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[13] Of course, as we have pointed out, Ringer and the other respondents come quite close to asking just that in asking the federal court to invalidate the Secretary's rule and to compel the Secretary to declare BCBR surgery "reasonable and necessary" within the meaning of the Medicare Act. *Supra*, at 610–611, 614, 620; Brief for Respondents 1, 10; App. 25–26.

vance of undergoing the procedure for which payment is sought, his claim does not "arise under" the Medicare Act and hence he is not precluded by § 405(h) from resorting to federal-question jurisdiction. But that argument amounts to no more than an assertion that the substance of Ringer's claim somehow changes and "arises under" another statute simply because he has not satisfied the procedural prerequisites for jurisdiction which Congress has prescribed in § 405(g).

The substance of Ringer's claim is identical to the substance of the claims of the other three respondents, claims whose substance and standing we have earlier concluded are derived from the Medicare Act. *Supra*, at 615–616. As we have earlier noted, *supra*, at 620, the fairest reading of the rather confusing amended complaint is that all respondents, including Ringer, wish both to invalidate the Secretary's rule and her instructions *and* to replace them with a new rule that allows them to get payment for BCBR surgery. While it is true that all of the respondents complain about the presumptive nature of the Secretary's current rule, it is equally true that they all—including Ringer—complain about the burden of exhaustion of administrative remedies and that they all seek relief that will allow them to receive benefits yet bypass that administrative process altogether. App. 9–10; n. 13, *supra*. With respect to the other three respondents, we hold today that all their claims—identical to Ringer's—are inextricably intertwined with what we hold is in essence a claim for benefits and that § 1331 jurisdiction over all their claims is barred by § 405(h). *Supra*, at 614–616. We decline to hold that the same claim asserted by Ringer should somehow be characterized in a different way for the purpose of § 1331 jurisdiction simply because Ringer has not satisfied the prerequisites for jurisdiction under § 405(g).

With respect to our holding that Ringer has not satisfied the nonwaivable requirement of § 405(g), the dissent adopts the remarkable view that the Secretary's promulgation of a

rule regarding BCBR surgery satisfies that nonwaivable requirement. The dissent would thus open the doors of the federal courts in the first instance to everyone—those who can and those who cannot afford to pay their surgeons without reliance on Medicare—who thinks that he might be eligible to participate in the Medicare program, who thinks that someday he might wish to have some kind of surgery, and who thinks that this surgery might somehow be affected by a rule that the Secretary has promulgated. Of course, it is of no great moment to the dissent that after adjudicating his claim in federal court, that individual may simply abandon his musings about having surgery. And it is of no great moment to the dissent that Congress, who surely could have provided a scheme whereby claimants could obtain declaratory judgments about their entitlement to benefits, has instead expressly set up a scheme that requires the presentation of a concrete claim to the Secretary.

The dissent's declaratory judgment notion effectively ignores the scheme which Congress has created and does nothing less than change the whole character of the Medicare system. The dissent argues that its frustration of Congress' scheme can be limited to the situation where the Secretary has promulgated a rule, or in the dissent's words, where she has "already issued an advisory opinion" about a certain surgical procedure in the form of a generally applicable rule. *Post*, at 642–643. Such a quest for restraint is admirable, but the logic of the dissent's position makes the quest futile. The dissent's concern in this case is with those perhaps millions of people, like Ringer, who desire some kind of controversial operation but who are unable to have it because their surgeons will not perform the surgery without knowing in advance whether they will be victorious in challenging the Secretary's rule in the administrative or later in the judicial process. *Post*, at 629–630, 643. But that concern exists to the same degree with any claimant, even in the absence of a generally applicable ruling by the Secretary. For example, a

surgeon called upon to perform any kind of surgery for a prospective claimant would, in the best of all possible worlds, wish to know in advance whether the surgery is "reasonable and necessary" within the meaning of the Medicare Act. And indeed some such surgeons may well decline to perform the requested surgery because of fear that the Secretary will not find the surgery "reasonable and necessary" and thus will refuse to reimburse them. The logic of the dissent's position leads to the conclusion that those individuals, as well as Ringer, are entitled to an advance declaration so as to ensure them the opportunity to have the surgery that they desire.

Furthermore, the solution that the dissent provides for Ringer—allowing him to challenge the Secretary's rule in federal court—hardly solves the problem that the dissent identifies. It is mere speculation to assume, as the dissent does, *post*, at 636–637, that a surgeon who is unwilling to perform surgery because of the existence of a rule will all of a sudden be willing to perform the surgery if the rule is struck down. That surgeon still faces a risk of not being paid in the administrative process, a risk that may well cause him to refuse to perform the surgery. The only sure way to ensure that all people desiring surgery are able to have it is to allow all of them to go into federal court or into the administrative process in advance of their surgery and get declarations of entitlement. Surely not even the dissent could sanction such a wholesale restructuring of the Medicare system in the face of clear congressional intent to the contrary.

IV

We hold that the District Court was correct in dismissing the complaint as to all respondents. Respondents urge affirmance of the Court of Appeals because "elderly, ill and disabled citizens who *[sic]* Congress intended to benefit from Social Security Act programs actually have suffered financially as well as physically" from the Secretary's conclusion that BCBR surgery is never "reasonable and neces-

sary." Brief for Respondents 31. But respondents Holmes, Webster-Zieber, and Vescio are not subject to the Secretary's formal ruling and stood the chance of prevailing in administrative appeals. Respondent Ringer has not undergone the procedure and could prevail only if federal courts were free to give declaratory judgments to anyone covered by Medicare as to whether he would be entitled to reimbursement for a procedure if he decided later to undergo it.

In the best of all worlds, immediate judicial access for all of these parties might be desirable. But Congress, in § 405(g) and § 405(h), struck a different balance, refusing declaratory relief and requiring that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place. Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year.[14] If the balance is to be struck anew, the decision must come from Congress and not from this Court.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in the judgment in part and dissenting in part.

The Medicare Act is designed to insure the elderly against the often crushing costs of medical care.[1] To that end, § 1862(a)(1) of the Act guarantees payment of all expenses "reasonable and necessary for the diagnosis or treatment of

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[14] In 1982 there were 48 million claims filed under Part A of the Medicare Program. Bureau of Program Operations, HCFA, U. S. Department of Health and Human Services, B. P. O. Part A, Intermediary Workload Report (May 1983).

[1] See, *e. g.*, H. R. Rep. No. 213, 89th Cong., 1st Sess., 20–22, 63–64 (1965); S. Rep. No. 404, 89th Cong., 1st Sess., 73–74 (1965).

illness or injury."[2] The Secretary has issued a formal ruling stating that she will not pay the costs of bilateral carotid body resection (BCBR) surgery performed after October 28, 1980, in order to treat pulmonary distress because for that purpose BCBR is neither medically reasonable nor necessary. 45 Fed. Reg. 71426–71427 (1980). Respondents contend that the rule was not adopted in accord with the relevant limitations on the Secretary's authority.

The three respondents who have undergone the BCBR procedure all did so prior to October 28, 1980. The Secretary's ruling as of that date does not prevent them from obtaining payment for BCBR, and in fact states that they may prevail if they demonstrate that they underwent the procedure in reliance on previous rulings indicating that BCBR is reimbursable.[3] I agree with the Court that the Secretary's ruling does not foreclose relief for them and that it is therefore appropriate to require them to exhaust their administrative remedies. If, after the administrative process is complete, these respondents are dissatisfied with the Secretary's decision, they may obtain judicial review pursuant to § 205(g) of the Social Security Act.[4]

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[2] "Notwithstanding any other provision of this subchapter, no payment may be made under part A or part B for any expenses incurred for items or services—

"(1) which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member," 42 U. S. C. § 1395y(a)(1).

[3] "As explained above, we have previously issued [a] policy in manual instructions excluding this service from Medicare coverage. However, since [Administrative Law Judges] and the Appeals Council have ruled in several cases that claims for these services are payable, it is possible that some beneficiaries, relying on these rulings, have proceeded to have the operation performed in expectation of Medicare payment. In fairness to those beneficiaries, we are making the ruling effective for services furnished after the date of publication." 45 Fed. Reg. 71427 (1980).

[4] In pertinent part that section provides:

"(g) Judicial review

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy,

The claim of respondent Ringer, however, stands on a different footing. The complaint indicates that Ringer, "who is 68 years of age, suffers from severe, chronic obstructive airways disease, (*i. e.*, severe emphysema), cor pulmonale and right heart strain," and that he is eligible for Medicare benefits and needs the operation[5] but cannot afford it unless the Secretary agrees to pay for it.[6] App. 10–11. The Secretary, however, has formally ruled that she will not pay for it, and has taken the position that Ringer cannot challenge her ruling, except in a proceeding seeking reimbursement for the cost of the surgery. Yet precisely because Ringer cannot afford the surgery, the Secretary will not permit him to file a claim for reimbursement, since he has incurred no expense that can be reimbursed.

Today, the majority holds that Ringer must have the operation that he cannot afford and cannot obtain because of the Secretary's ruling before he can challenge that ruling. As I understand it, the Court concludes that there is no federal-question jurisdiction over this case under 28 U. S. C. § 1331[7]

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may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia." 42 U. S. C. § 405(g).

[5] The Secretary stipulated that each of the respondents would testify that he has been diagnosed as suffering from severe lung disease, that each has experienced severe breathing difficulties as a symptom of his or her illness, and that BCBR surgery has been prescribed to alleviate the symptoms of their lung diseases. The respondents are all Medicare beneficiaries eligible for statutory benefits. App. 32.

[6] The Secretary stipulated that Ringer will testify that he has had prescribed and desires to undergo BCBR surgery but is unable to pay the cost thereof. *Ibid.*

[7] That section provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

because Ringer has a "claim arising under the Medicare Act," *ante*, at 621, which cannot be asserted under § 1331 by virtue of § 205(h) of the Social Security Act.[8] Therefore, the Court continues, jurisdiction over this case can be exercised if at all under § 205(g). Yet the Court also holds that there is no jurisdiction under § 205(g) because Ringer has not submitted a claim for reimbursement. Of course, the reason he has not filed such a claim is that there is nothing to reimburse—he has incurred no expenses because he cannot afford to do so. Without anything to reimburse, the Secretary refuses to provide a hearing on what she and the Court believe to be a nonexistent "claim." Thus the only way Ringer can pursue his § 205(g) remedy is by doing something that the Secretary will not let him do.

Thus, it would seem, Ringer both does and does not have a claim which arises under the Medicare Act. He cannot file a claim under the Medicare Act until after he has the operation; he cannot have the operation unless he can challenge the Secretary's ruling; and he cannot challenge that ruling except in an action seeking judicial review of the denial of a claim under the Medicare Act. This one-eyed procedural analysis frustrates the remedial intent of Congress as plainly as it frustrates this litigant's plea for a remedy. The cruel irony is that a statute designed to help the elderly in need of medical assistance is being construed to protect from administrative absolutism only those wealthy enough to be able to afford an operation and then seek reimbursement.

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[8] That subsection provides:

"Finality of Secretary's decision

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 42 U. S. C. § 405(h).

The Court's mistaken analysis of Ringer's claim stems from its failure to recognize that the jurisdictional limitation in § 205(h) refers only to actions "to recover on any claim arising under this subchapter"—claims that are within the jurisdictional grant in § 205(g). Section 205(h) is simply inapplicable to a claim that cannot be asserted in an action under § 205(g), and hence does not preclude the assertion of jurisdiction over such a claim under § 1331.

I

A careful reading of the plain language of the relevant statutes indicates that the statutory scheme does not preclude jurisdiction over Ringer's challenge to the Secretary's ruling under 28 U. S. C. § 1331. That is because the preclusive provision on which the Court relies, § 205(h), simply does not apply to Ringer's claim.[9]

Section 1869(a) of the Medicare Act provides that the determination whether an individual is entitled to Medicare benefits shall be made by the Secretary pursuant to prescribed regulations.[10] Since the Secretary and the Court agree that Ringer has submitted no "claim" on which the Sec-

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[9] The Court's analysis is confined to the question whether Ringer's action is one "arising under" the Medicare Act; it never attempts to construe the immediately preceding words in § 205(h): "any claim to recover." See *ante*, at 621–624. The majority thereby is able to attack a straw man, since by focusing only on the words "arising under" it avoids the question of how Ringer can have "any claim to recover arising under" that Act when he cannot submit any claim for Medicare benefits because he cannot afford the operation. Since Ringer cannot have the operation and is not seeking reimbursement, he has nothing on which he can recover. When the statute is read as a whole the flaw in the Court's analysis becomes apparent.

[10] Section 1869(a) provides:

"Entitlement to and amount of benefits

"The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him." 42 U. S. C. § 1395ff(a).

retary could have acted,[11] it is perfectly clear that the Secretary has made no determination pertaining to Ringer that is covered by § 1869(a).[12] Section 1869(b)(1)(C) states that an individual "dissatisfied with any determination made under subsection (a)" is entitled to the kind of hearing authorized by § 205(b) of Title II of the Social Security Act, and to judicial review as prescribed in § 205(g) of that Title.[13] Since there has been no "determination" in this case, this provision does not apply to Ringer either.[14]

We come then to § 1872, which in relevant part provides that § 205(h) shall "apply with respect to this subchapter to the same extent as [it is] applicable with respect to subchapter II of this chapter."[15] Nowhere in this reticulated

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[11] See *ante*, at 622; Brief for Petitioner 37.

[12] In fact, Ringer wrote the Secretary a letter seeking such a determination but was told that no determination could be made unless he had the surgery and then sought reimbursement. Respondent Vescio also could not afford the operation. Eventually her condition deteriorated to the point where her physician agreed to operate without any assurance of payment. Ms. Vescio died a little more than a year after the operation. Brief for Respondents 9, and n. 10.

[13] "(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

. . . . .

"(C) the amount of benefits under part A (including a determination where such amount is determined to be zero)

"shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title." 42 U. S. C. § 1395ff(b)(1)(C).

[14] This is made even clearer by the fact that § 1869(b)(1)(C) also provides for the applicant's right to an administrative hearing as provided by § 205(b) and "to judicial review of the Secretary's final decision after such hearing as is provided in § [2]05(g)." Because Ringer's action is not such a challenge, the provisions of § 1869 have no application here.

[15] Section 1872 reads as follows:

"The provisions of sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (f), (h), (i), (j), (k), and (l) of section 405 of this title, shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter." 42 U. S. C. § 1395ii.

statutory scheme is there any requirement that every "question" arising under the Medicare Act must be litigated in an action brought under § 205(g). Quite the contrary § 1872 applies § 205(h) to "this subchapter," *i. e.*, to the provisions concerning reimbursement determinations contained in § 1869. Yet not one of the provisions in that section is relevant to Ringer. Ringer's claim is not the type of claim covered by "this subchapter," since the subchapter applies only to the type of hearing provided for in § 205(b). What Ringer seeks is not the type of hearing provided for in § 205(b), which would arise under "this subchapter," but instead an action under the right-of-review provisions of the Administrative Procedure Act (APA), 5 U. S. C. §§ 701–706.[16] Hence 28 U. S. C. § 1331 provides jurisdiction to entertain such a claim. See *Califano* v. *Sanders*, 430 U. S. 99 (1977).

This analysis is confirmed by *Weinberger* v. *Salfi*, 422 U. S. 749 (1975). In that case, on which the majority relies so heavily, the Court held that when a claimant seeks payment of benefits under the Social Security Act, his claim "arises under" that Act within the meaning of § 205(h) and hence may not be brought pursuant to 28 U. S. C. § 1331.[17] The obvious difference between this case and *Salfi* is that Salfi had a claim which could be raised under §§ 205(b) and (g); indeed the Court upheld the exercise of jurisdiction over that case under § 205(g). See 422 U. S., at 763–767. Salfi

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[16] In particular, the APA provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ." 5 U. S. C. § 702.

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ." § 704.

[17] It should be noted that the portion of *Salfi* on which the majority relies is dicta. Since the Court held that it had jurisdiction over that case under § 205(g), its discussion of the preclusive effect of § 205(h) was unnecessary to the decision in that case. See 422 U. S., at 787–788 (BRENNAN, J., dissenting).

therefore had a "claim" under the Social Security Act, and fell within the literal language of § 205(h) because he had filed an application for payment of benefits; review of the decision on such an application falls within the preclusive provisions of § 205(h):

> "The entitlement sections of the Act specify the filing of an application as a prerequisite to entitlement, so a court could not in any event award benefits absent an application. . . . Once the application is filed, it is either approved, in which event any suit for benefits would be mooted, or it is denied. Even if the denial is nonfinal, it is still a 'decision of the Secretary' which, by virtue of the second sentence of § [2]05(h), may not be reviewed save pursuant to § [2]05(g)." 422 U. S., at 759, n. 6.

Thus, what *Salfi* holds is that § 205(h) "precludes federal-question jurisdiction in an action challenging denial of claimed benefits." *Mathews* v. *Eldridge*, 424 U. S. 319, 327 (1976).

In contrast to Salfi, Ringer has no "claim" within the meaning of the Social Security Act—because he is unable to have the operation, he cannot file an application for reimbursement and no "decision of the Secretary" has been made denying such a claim[18] which could fall under § 205(h). Hence he

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[18] The Solicitor General makes this point very clearly:

"As typically is the case in insurance programs generally, a claim may be filed under Medicare (thereby invoking the administrative process that must precede the right to judicial review under 42 U. S. C. 405(g)) only *after* the individual has been furnished the services for which payment is sought. See 42 U. S. C. (& Supp. V) 1395c, 1395d(a), 1395f(a), 1395ff(b) and 405(b); 42 CFR 405.1662–405.1667. Congress obviously appreciated that the task of administering the Medicare Program would be burdensome enough with the processing of concrete claims for services already rendered, without also providing for a scheme by which an individual could obtain a declaratory ruling on whether certain services would be covered should the individual elect to obtain them in the future." Brief for Petitioner 37, n. 26 (emphasis in original).

does not fall within the preclusive language of § 205(h), which requires the existence of a "claim arising under the Social Security Act." Section 205(h) cannot operate in this context as it was intended—"to route review through § 205(g)." *Sanders*, 430 U. S., at 103, n. 3. It thus simply has no application. Because Ringer cannot afford the operation and obtain judicial review under the relevant provisions of the Medicare Act, he has no "claim" that "arises under" that Act and is unable to generate one.[19]

There is yet another fundamental reason why § 205(h) does not preclude Ringer's claim. Section 205(h) precludes only actions "to recover" on a claim arising under the Social Security Act. That language plainly refers to an action in which the claimant seeks payment of benefits. Indeed, as I ob-

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[19] There is a wealth of authority in the lower courts for the proposition that when the Social Security Act provides no avenue for review, there is no claim arising under that Act within the meaning of § 205(h) and hence no bar to jurisdiction under 28 U. S. C. § 1331. See *National Assn. of Home Health Agencies* v. *Schweiker*, 223 U. S. App. D. C. 209, 217–218, 690 F. 2d 932, 940–942 (1982), cert. denied, 459 U. S. 1205 (1983); *Chelsea Community Hospital, SNF* v. *Michigan Blue Cross Assn.*, 630 F. 2d 1131, 1133–1136 (CA6 1980); *Humana of South Carolina, Inc.* v. *Califano*, 191 U. S. App. D. C. 368, 374–375, 590 F. 2d 1070, 1076–1077 (1978); *Overlook Nursing Home, Inc.* v. *United States*, 214 Ct. Cl. 60, 64–65, 556 F. 2d 500, 502 (1977); *Hazelwood Chronic & Convalescent Hospital, Inc.* v. *Weinberger*, 543 F. 2d 703, 706–707 (CA9 1976); *Whitecliff, Inc.* v. *United States*, 210 Ct. Cl. 53, 56–59, 536 F. 2d 347, 350–351 (1976), cert. denied, 430 U. S. 969 (1977); *Rothman* v. *Hospital Service of Southern California*, 510 F. 2d 956, 958–959 (CA9 1975); *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663, 666–668 (CA2 1973); *Mid Atlantic Nephrology Center, Ltd.* v. *Califano*, 433 F. Supp. 23, 31–32 (Md. 1977); *Hillside Community Hospital of Ukiah* v. *Mathews*, 423 F. Supp. 1168, 1172–1173 (ND Cal. 1976); *Americana Nursing Centers, Inc.* v. *Weinberger*, 387 F. Supp. 1116, 1118 (SD Ill. 1975); *Mount Sinai Hospital of Greater Miami, Inc.* v. *Weinberger*, 376 F. Supp. 1099, 1005–1108 (SD Fla. 1974), rev'd on other grounds, 517 F. 2d 329 (CA5 1975), modified, 522 F. 2d 179, cert. denied, 425 U. S. 935 (1976); *Gainville* v. *Richardson*, 319 F. Supp. 16, 18 (Mass. 1970) (three-judge court).

served above, *Salfi* stressed that the claimant in that case sought the payment of benefits.[20] Today's majority finds § 205(h) applicable because Ringer "is clearly seeking to establish a right to future payments should he ultimately decide to proceed with BCBR surgery." *Ante*, at 621. If Ringer were seeking payment of benefits, this might well be a different case, but that is plainly not what he seeks. Ringer seeks a declaration that the Secretary's BCBR rule is invalid and an injunction against its operation. He alleges that it is the "irrefutable presumption" contained in the rule—which denies administrative law judges discretion to decide in a hearing under § 205(b) whether BCBR is reimbursable—that prevents him from having the operation.[21] Ringer disavows any desire to obtain a judicial determination that benefits must be paid to him. Brief for Respondents 6–7. Thus, Ringer is not seeking "to recover." Instead he seeks an injunction against this "irrefutable presumption." Such an injunction would not result in the payment of benefits, but merely remove the hurdle to his having the operation, since under those circumstances his physician would have some hope of obtaining reimbursement through the administrative process.[22]

> "Unlike the plaintiff in *[Salfi]*, whose action was the run-of-mine type clearly fitting the language 'to recover

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[20] See *supra*, at 633–635. See also 422 U. S., at 760–761.

[21] App. 10–11. See also Brief for Respondents 9, 26–29.

[22] In this connection, it must be remembered that surgeons have had remarkable success in winning cases before Administrative Law Judges concerning BCBR surgery. The parties stipulated that as of the date the BCBR regulation was issued, at least 199 appeals of denials of Medicare reimbursement for BCBR surgery had been heard by Administrative Law Judges. Of these, reimbursement was ordered in at least 170 cases, and at least 12 cases were dismissed as premature. Decisions ordering reimbursement had been rendered by at least 10 different Administrative Law Judges and the three judges of the Secretary's Appeals Council. App. 32. It was this success which led to the promulgation of the challenged rule.

> on any claim arising under' Title II, the plaintiff in this case . . . raises only a procedural challenge, the adjudication of which will not affect the substantive question of continued entitlement to [Medicare] benefits." *Ellis* v. *Blum*, 643 F. 2d 68, 82 (CA2 1981) (Friendly, J.).[23]

Ringer is not seeking to "bypass the exhaustion requirements of the Medicare Act," *ante*, at 621, but rather to be *able* to exhaust—something he can only do if the rule is enjoined so that he and his surgeon can seek reimbursement through the administrative process.[24] Ringer's challenge to the operation of a rule that prevents him from having a "claim" he can pursue under § 205 is therefore not a claim covered by § 205(h)—it is a challenge to a procedural rule that could prove meritorious even if Ringer is ultimately not entitled to reimbursement. Hence it can be asserted under § 1331.

II

Unfortunately the majority's errors in this case are not limited to its construction of § 205(h). For even if we assume that § 205(h) is applicable to Ringer's case, and that he can obtain judicial review only through § 205(g), the majority's disposition would still be incorrect.

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[23] See *National Assn. of Home Health Agencies* v. *Schweiker*, 223 U. S. App. D. C., at 213–214, 690 F. 2d, at 936–937; *Humana of South Carolina, Inc.* v. *Califano*, 191 U. S. App. D. C., at 378–379, 590 F. 2d, at 1080–1081; *Mid Atlantic Nephrology Center, Ltd.* v. *Califano*, 433 F. Supp., at 31–32; *Gainville* v. *Richardson*, 319 F. Supp., at 18 (three-judge court). See also *Griffin* v. *Richardson*, 346 F. Supp. 1226, 1230 (Md.) (three-judge court), summarily aff'd, 409 U. S. 1069 (1972).

[24] As a result, the majority's statement that "Ringer has not given the Secretary an opportunity to rule on a concrete claim for reimbursement," *ante*, at 622, has a somewhat callous tone. Ringer would like nothing more than to give the Secretary that opportunity. It is the challenged rule which prevents Ringer from having the operation and giving the Secretary "an opportunity" to rule on his claim for reimbursement.

Section 205(g) contains three jurisdictional prerequisites to judicial review: a "[1] final [2] decision of the Secretary [3] made after a hearing . . . ."[25] In *Salfi*, the Court decided that the first and third elements are "waivable" upon an appropriate showing, whereas the second element is nonwaivable and must be satisfied in all cases before judicial review may be obtained. See 422 U. S., at 764–767.

Ringer has plainly satisfied the nonwaivable element. While "some decision by the Secretary is clearly required by the statute," *Mathews* v. *Eldridge*, 424 U. S., at 328,[26] the Secretary has made a decision here. By issuing the challenged BCBR regulation, she decided that BCBR can in no event be reimbursable. If that is not a "decision of the Secretary," I do not know what is. The fact that Ringer himself has not raised his legal arguments concerning the BCBR regulation in the administrative process is irrelevant, as *Eldridge* makes clear. There, the claimant did not raise his constitutional challenge to procedures the Secretary had adopted by regulation in the administrative process, yet the Court held that the nonwaivable element had been satisfied since the Secretary had already made clear what his "decision" was with respect to Eldridge's challenge through the issuance of the disputed regulations: "It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." *Id.*, at 330. It is similarly unrealistic to think that the Secretary would reconsider her BCBR regulation in the context of a single adjudicatory pro-

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[25] See n. 4, *supra*. Section 205(g) also contains a statute of limitations and a venue requirement. "As such, they are waivable by the parties, and not having been timely raised below, see Fed. Rules Civ. Proc. 8(c), 12(h)(1), need not be considered here." 422 U. S., at 764.

[26] See also *Heckler* v. *Lopez*, 464 U. S. 879, 883 (1983) (STEVENS, J., dissenting in part) (on motion to vacate stay); *Schweiker* v. *Wilson*, 450 U. S. 221, 228, n. 8 (1981); *Califano* v. *Sanders*, 430 U. S. 99, 108 (1977).

ceeding. The regulation was issued to *prevent* claimants from litigating the reimbursability of BCBR in an adjudicatory context. Thus, the relevant decision of the Secretary here could not be any decision made in the administrative process; rather it is the decision to issue the BCBR regulation. That "decision of the Secretary" satisfies the nonwaivable portion of § 205(g).[27]

The waivable elements are satisfied as well. In *Salfi*, the Court held that waiver was appropriate when there is no chance that the claimant could prevail in the administrative process. In such circumstances, "further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." 422 U. S., at 765–766.[28] Here, just as in *Salfi*, "a hearing [would] be futile and wasteful." *Id.*, at 767.[29] The Secretary has stipulated that if

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[27] Thus, the majority's characterization of the nonwaivable requirement as "presenting a claim for reimbursement" to the Secretary, *ante*, at 617, is not quite correct. What the plain language of the statute requires is not "presentment" of a "claim for reimbursment"—those words appear nowhere in § 205(g). Rather, what the statute requires is a "decision of the Secretary." As for the language in *Eldridge* on which the majority relies, it is most sensibly read not as indicating that the statute says something that it manifestly does not, but rather that the usual (but not necessarily the only) means for obtaining a "decision of the Secretary" is the filing of an application for benefits.

[28] While *Salfi* contains language suggesting that only the Secretary can decide whether the finality and hearing elements of § 205(g) should be waived, subsequent cases have made clear that when no purpose would be served by requiring further exhaustion, deference to the Secretary's judgment as to waiver would be inappropriate and the waivable elements may be satisfied over the Secretary's objection because of futility. See *Mathews* v. *Diaz*, 426 U. S. 67, 76–77 (1976); *Eldridge*, 424 U. S., at 330. See also *ante*, at 617–619; *Heckler* v. *Lopez*, 464 U. S., at 883 (STEVENS, J., dissenting in part) (on motion to vacate stay).

[29] See also *Califano* v. *Goldfarb*, 430 U. S. 199, 203, n. 3 (1977); *Mathews* v. *Diaz*, 426 U. S., at 76–77; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 641, n. 8 (1975).

Ringer had the operation and filed a claim for reimbursement, it would be denied under the BCBR regulation. App. 32. Since the Secretary "stipulated in the District Court that [Ringer]'s application would be denied . . . we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Mathews* v. *Diaz*, 426 U. S. 67, 76–77 (1976). Requiring the administrative process to be invoked so it can be determined whether applications such as Ringer's could also be denied on some other ground would simply be "a commitment of administrative resources unsupported by any administrative or judicial interest," especially since Ringer is not seeking the payment of benefits at this juncture. When a case is ripe for summary judgment because of a dispositive legal question, we do not require district courts to hold a trial anyway to determine if the complaint might be meritless on some other ground. It makes no more sense to impose such a requirement in the context of § 205(g).[30] Indeed, in light of the dispositive rule, there is no reason to believe that the Secretary would waste her resources by holding a hearing to see if Ringer's claim could be denied on some other ground, and the Secretary has not represented that such a hearing in fact would be held.

Moreover, even if a claim such as Ringer's should ordinarily be exhausted, the waivable element is satisfied when there is a "colorable claim" that the claimant will be injured if forced to exhaust in a way that cannot be remedied by later payment of benefits. *Ante*, at 617–618. Ringer clearly has such a claim. He suffers from serious pulmonary distress, and represents that if he does not get BCBR he faces a risk

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[30] See, *e. g.*, *Kuehner* v. *Schweiker*, 717 F. 2d 813, 817–818 (CA3 1983); *Jones* v. *Califano*, 576 F. 2d 12, 18–19 (CA2 1978); *Liberty Alliance of the Blind* v. *Califano*, 568 F. 2d 333, 346 (CA3 1977); *De Lao* v. *Califano*, 560 F. 2d 1384, 1388 (CA9 1977); *Fitzgerald* v. *Schweiker*, 538 F. Supp. 992, 997–999 (Md. 1982); *Kennedy* v. *Harris*, 87 F. R. D. 372 (SD Cal. 1980).

of continued deterioration in his health, and even death.[31] Surely, the injury Ringer faces while awaiting judicial review—which on the majority's view he in any event can never obtain because of his inability to afford the operation—constitutes a collateral injury not remedied even if Ringer somehow could exhaust his administrative "remedy."

> "To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment." *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 261 (1974) (footnote omitted).

Thus, Ringer "has raised at least a colorable claim that because of his physical condition and dependency on [Medicare] benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." *Eldridge*, 424 U. S., at 331 (footnote omitted). Ringer should be permitted to challenge the BCBR rule which causes this injury without satisfying the waivable requirements of § 205(g).[32]

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[31] One of the original plaintiffs in the District Court, Ernie M. Haley, was, like Ringer, unable to afford the operation and died while awaiting BCBR. Brief for Respondents 9. Thus, the risk Ringer faces because of his inability to obtain judicial review at this juncture is far from speculative.

[32] Cf. *Eldridge*, 424 U. S., at 331, n. 11 ("the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable [to § 205(g)]").

Thus, jurisdiction over this case is appropriate under § 205(g). The Secretary has surely made a "decision" on BCBR within the meaning of that statute, and to require further pursuit of adjudicatory remedies when the purpose of the challenged rule is to preclude adjudication is a potentially tragic exercise in futility.

III

The Court's inability to find a jurisdictional basis for Ringer's challenge to the Secretary's formal ruling stems in part from a concern that the Secretary and the federal courts would otherwise be flooded by requests for advisory opinions by individuals contemplating various forms of medical treatment. There is no need to evaluate this purely hypothetical concern because this case presents no question concerning Ringer's "right" to an advisory opinion or the Secretary's "duty" to provide one. We may assume that the Secretary is under no duty to volunteer an opinion on the reimbursability of a given procedure and yet sustain Ringer's claim. The reason is simple—the Secretary has already issued an advisory opinion on BCBR. That is exactly what her BCBR regulation is. The regulation was specifically designed to prevent this issue from arising in a concrete adjudicatory context. Indeed, her ruling is far more significant than mere advice; it is a formal pronouncement directing the bureaucracy under her command to reject all claims for reimbursement for BCBR surgery, despite the uniform course of decision by a variety of Administrative Law Judges, as well as the Secretary's Appeals Council, that such claims qualify for reimbursement. Thus, this is not a case concerning a "right" to an advisory opinion. Rather, this case poses the question whether, once the Secretary issues a rule which has the effect of denying a Medicare beneficiary surgery, that beneficiary may obtain judicial review as to the validity of the rule.[33] I see no reason why that question should be an-

[33] The majority argues that the logic of my position applies to any person who wishes to obtain an advisory opinion from the Secretary. *Ante*, at

swered negatively. Medicare beneficiaries can obtain judicial review of all of the Secretary's adjudicatory decisions that deny them benefits; I am certain that Congress did not intend to preclude judicial review of the Secretary's legislative decisions which have the same effect.[34]

IV

The majority has decided that it is proper to prevent a citizen from *ever* challenging a rule which denies him surgery he desperately needs. Ringer cannot afford the operation and therefore his "claim" can never be "pursued" in a reimbursement proceeding. In making this decision, the Court ignores a basic proposition of administrative law. What Justice Harlan wrote for the Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), illustrates the point:

624–626. It does not. If a surgeon thinks that a given procedure is medically necessary and reasonable, he should be confident of his ability to convince an administrative law judge of exactly that, and therefore will provide the operation with the expectation of receiving reimbursement after the fact through the administrative process. Indeed that is the way that *most* surgery is in fact provided under Medicare; the surgeon does not require prepayment precisely because he is confident he will be reimbursed. That is certainly true here—Ringer's surgeon would provide the surgery if he were given an opportunity to obtain a hearing after the fact. My position only applies to persons who are *unable* to obtain a hearing because the Secretary has pre-empted the administrative process. That is the effect of her BCBR rule, and why it is meaningless to speak of Ringer "pursuing" his administrative remedies.

[34] The majority's fear of a flood of Medicare actions seeking advisory opinions is put into perspective by the fact that not a single lawsuit was filed seeking an advisory determination as to the reimbursability of BCBR until the Secretary issued the challenged regulation. The reason is simple enough—at that point persons like Ringer had access to an administrative remedy. Jurisdiction over Ringer's claim would not increase the volume of Social Security Act litigation; rather, it would simply enable persons aggrieved by the Secretary's legislative rulings to obtain the judicial review that they otherwise would have been able to obtain following an adjudicative proceeding. Moreover, it appears that actions like Ringer's would be relative rarities. The Secretary's decision to pre-empt the administrative process with respect to BCBR appears to be highly unusual.

"The first question we consider is whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Early cases in which this type of judicial review was entertained, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U. S. C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U. S. C. § 701(a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U. S. C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. Again in *Rusk* v. *Cort*, [369 U. S. 367, 379–380 (1967)], the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*, at 139–141 (citations omitted).

As Justice Harlan indicated, *Abbott* is but one in a long line of cases holding that nothing less than clear and convincing

evidence of legislative intent to preclude judicial review is required before a statute will be construed to preclude the citizen's right to seek judicial redress for violations of his rights.[35] *Salfi* itself applied this presumption to the Social Security Act, and construed § 205(h) to preclude judicial review in that case only because review was available under § 205(g). 422 U. S., at 762. In our system of government under law, administrative absolutism is not the rule, but only the narrow exception.

In this case Ringer, whose only sin is that he is unable to afford BCBR surgery, is denied access to any judicial review of what we must take to be a rule that violates the Secretary's statutory duty to assure reimbursement of necessary and reasonable medical expenses under a health insurance program. Because he cannot afford the surgery, he will never be able to seek administrative or judicial review.

> "Here . . . 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress has given . . . for there is no other means, within [Ringer's] control, to protect and enforce that right. And 'the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.' This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom* v. *Kyne*,

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[35] See, *e. g.*, *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 454, 462 (1979); *Morris* v. *Gressette*, 432 U. S. 491, 500–501 (1977); *Dunlop* v. *Bachowski*, 421 U. S. 560, 567–568 (1975); *Johnson* v. *Robison*, 415 U. S. 361, 373–374 (1974); *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410 (1971); *Tooahnippah* v. *Hickel*, 397 U. S. 598, 605–606 (1970); *Barlow* v. *Collins*, 397 U. S. 159, 166–167 (1970); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 156–157 (1970); *Brownell* v. *Tom We Shung*, 352 U. S. 180, 185 (1956); *Heikkila* v. *Barber*, 345 U. S. 229, 232 (1953).

358 U. S. 184, 190 (1958) (citations omitted) (quoting *Switchmen* v. *National Mediation Board*, 320 U. S. 297, 300 (1943)).

When the issue is properly phrased in terms of whether there is clear and convincing evidence that Congress intended to preclude judicial review of such a case, it is essential to remember that the entire statutory scheme was enacted for the benefit of the aged, the infirm, and the impoverished. It was the medically needy that Congress sought to aid through the provision of health insurance under the Medicare program. Yet those most in need of comprehensive medical insurance are those with the least ability to assert their statutory right to such insurance under the majority's approach. In telling Ringer that "he must pursue his claim" under § 205(g), the Court indicates that he will have the "right" to judicial review only if he can pay for it—and he cannot.

> "To sanction such a ruthless consequence . . . would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'" *Griffin* v. *Illinois*, 351 U. S. 12, 23 (1956) (Frankfurter, J., concurring in judgment).

On the majority's view it would appear the rich and the poor alike also have the right to front the money for major surgery. I cannot believe that is what Congress intended, or what our precedents require.

Of course, the integrity of the administrative exhaustion mechanism created by Congress is vital, and the Act should not be construed in a way that would undermine that system. But all Ringer seeks to do is challenge a rule that prevents him from having the operation and then seeking reimbursement through the statutory review system. It is not Ringer who is bypassing the administrative review system, but the

Secretary, whose BCBR rule prevents persons such as Ringer from seeking administrative review of a concrete claim for benefits. I can find no evidence, much less clear and convincing evidence, that Congress intended to prohibit judicial review in these circumstances.

Ringer does not seek payment of benefits under the Medicare Act, but rather to challenge a rule that prevents him from ever filing a claim for reimbursement under that Act. Therefore I would hold that Ringer is not seeking "to recover on a claim" under the Social Security Act, and hence federal jurisdiction over his claim is not barred by § 205(h) of that Act. Moreover, even if § 205(h) applied here, I would not require Ringer to pursue administrative review which is manifestly futile. Accordingly, while I concur in the Court's disposition of the claims asserted by the respondents who have had BCBR surgery, I respectfully dissent from its disposition of respondent Ringer's claim.

UNITED STATES *v.* CRONIC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 82–660. Argued January 10, 1984—Decided May 14, 1984

Respondent and two associates were indicted on mail fraud charges involving a "check kiting" scheme whereby checks were transferred between a bank in Florida and a bank in Oklahoma. When respondent's retained counsel withdrew shortly before the scheduled trial date, the District Court appointed a young lawyer with a real estate practice who had never participated in a jury trial to represent respondent, but allowed him only 25 days to prepare for trial, even though the Government had taken over four and one-half years to investigate the case and had reviewed thousands of documents during that investigation. Respondent was convicted, but the Court of Appeals reversed, because it inferred that respondent's right to the effective assistance of counsel under the Sixth Amendment had been violated. Finding it unnecessary to inquire into counsel's actual performance at trial, the court based its inference on the circumstances surrounding the representation of respondent, particularly (1) the time afforded for investigation and preparation, (2) the experience of counsel, (3) the gravity of the charge, (4) the complexity of possible defenses, and (5) the accessibility of witnesses to counsel.

Held: The Court of Appeals erred in utilizing an inferential approach in determining whether respondent's right to the effective assistance of counsel had been violated. Pp. 653–667.

(a) The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred. Pp. 653–657.

(b) Here, while the Court of Appeals purported to apply a standard of reasonable competence, it did not indicate that there had been an actual breakdown of the adversarial process during a trial. Instead, it concluded that the circumstances surrounding the representation of respondent mandated an inference that counsel was unable to discharge his duties. Only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial. Pp. 657–662.

(c) The five criteria identified by the Court of Appeals as the circumstances surrounding respondent's representation warranting a finding of ineffective assistance of counsel, while relevant to an evaluation of a law-

yer's effectiveness in a particular case, neither separately nor in combination provide a basis for concluding that competent counsel was not able to provide this respondent with the guiding hand that the Constitution guarantees. Pp. 663–666.

(d) This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary. Respondent can make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel. Pp. 666–667.

675 F. 2d 1126, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., concurred in the judgment.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *John Fichter De Pue.*

Steven Duke by appointment of the Court, 462 U. S. 1128, argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Respondent and two associates were indicted on mail fraud charges involving the transfer of over $9,400,000 in checks between banks in Tampa, Fla., and Norman, Okla., during a 4-month period in 1975. Shortly before the scheduled trial date, respondent's retained counsel withdrew. The court appointed a young lawyer with a real estate practice to represent respondent, but allowed him only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case and it had reviewed thousands of documents during that investigation. The two codefendants agreed to testify for the Government;

*Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers et al. by *John J. Cleary;* and for the National Legal Aid and Defender Association et al. by *Richard J. Wilson, Charles S. Sims,* and *Burt Neuborne.*

respondent was convicted on 11 of the 13 counts in the indictment and received a 25-year sentence.

The Court of Appeals reversed the conviction because it concluded that respondent did not "have the Assistance of Counsel for his defence" that is guaranteed by the Sixth Amendment to the Constitution.[1] This conclusion was not supported by a determination that respondent's trial counsel had made any specified errors, that his actual performance had prejudiced the defense, or that he failed to exercise "the skill, judgment, and diligence of a reasonably competent defense attorney"; instead the conclusion rested on the premise that no such showing is necessary "when circumstances hamper a given lawyer's preparation of a defendant's case."[2] The question presented by the Government's petition for certiorari is whether the Court of Appeals has correctly interpreted the Sixth Amendment.

I

The indictment alleged a "check kiting" scheme.[3] At the direction of respondent, his codefendant Cummings opened a bank account in the name of Skyproof Manufacturing, Inc. (Skyproof), at a bank in Tampa, Fla., and codefendant Merritt opened two accounts, one in his own name and one in the name of Skyproof, at banks in Norman, Okla.[4] Knowing that there were insufficient funds in either account, the defendants allegedly drew a series of checks and wire transfers on the Tampa account aggregating $4,841,073.95, all of which were deposited in Skyproof's Norman bank account during the period between June 23, 1975, and October 16, 1975;

[1] The Sixth Amendment provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] 675 F. 2d 1126, 1128 (CA10 1982).

[3] See *Williams* v. *United States*, 458 U. S. 279, 280–282, and n. 1 (1982).

[4] Skyproof, according to the indictment, was largely a facade and pretense to permit the withdrawal of large sums of money from these banks.

during approximately the same period they drew checks on Skyproof's Norman account for deposits in Tampa aggregating $4,600,881.39. The process of clearing the checks involved the use of the mails. By "kiting" insufficient funds checks between the banks in those two cities, defendants allegedly created false or inflated balances in the accounts. After outlining the overall scheme, Count I of the indictment alleged the mailing of two checks each for less than $1,000 early in May. Each of the additional 12 counts realleged the allegations in Count I except its reference to the two specific checks, and then added an allegation identifying other checks issued and mailed at later dates.

At trial the Government proved that Skyproof's checks were issued and deposited at the times and places, and in the amounts, described in the indictment. Having made plea bargains with defendants Cummings and Merritt, who had actually handled the issuance and delivery of the relevant written instruments, the Government proved through their testimony that respondent had conceived and directed the entire scheme, and that he had deliberately concealed his connection with Skyproof because of prior financial and tax problems.

After the District Court ruled that a prior conviction could be used to impeach his testimony, respondent decided not to testify. Counsel put on no defense. By cross-examination of Government witnesses, however, he established that Skyproof was not merely a sham, but actually was an operating company with a significant cash flow, though its revenues were not sufficient to justify as large a "float" as the record disclosed. Cross-examination also established the absence of written evidence that respondent had any control over Skyproof, or personally participated in the withdrawals or deposits.[5]

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[5] A good deal of evidence concerned the efforts of the Norman bank to recoup its losses, and also the efforts of respondent to make restitution. The bank took over a local bottling company in Texas that had been acquired by Skyproof while the scheme was in operation, and respondent

The 4-day jury trial ended on July 17, 1980, and respondent was sentenced on August 28, 1980. His counsel perfected a timely appeal, which was docketed on September 11, 1980. Two months later respondent filed a motion to substitute a new attorney in the Court of Appeals, and also filed a motion in the District Court seeking to vacate his conviction on the ground that he had newly discovered evidence of perjury by officers of the Norman bank, and that the Government knew or should have known of that perjury. In that motion he also challenged the competence of his trial counsel.[6] The District Court refused to entertain the motion while the appeal was pending. The Court of Appeals denied the motion to substitute the attorney designated by respondent, but did appoint still another attorney to handle the appeal. Later it allowed respondent's motion to supplement the record with material critical of trial counsel's performance.

The Court of Appeals reversed the conviction because it inferred that respondent's constitutional right to the effective assistance of counsel had been violated. That inference was based on its use of five criteria: "'(1) [T]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.'" 675 F. 2d 1126, 1129 (CA10 1982) (quoting *United States* v. *Golub*, 638 F. 2d 185, 189 (CA10 1980)). Under the test employed by the Court of Appeals, reversal is required even if

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apparently offered to make the bank whole with funds to be supplied by a rich aunt. That evidence did not provide respondent with much of a defense to the mail fraud charges, but was considered relevant to sentencing by the District Court.

[6] During trial, in response to questions from the bench, respondent expressed his satisfaction with counsel's performance. However, in his motion for new trial, respondent attacked counsel's performance and explained his prior praise of counsel through an affidavit of a psychologist who indicated that he had advised respondent to praise trial counsel in order to ameliorate the lawyer's apparent lack of self-confidence.

the lawyer's actual performance was flawless. By utilizing this inferential approach, the Court of Appeals erred.

II

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries."[7] Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail,"[8] as

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[7] "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963).

[8] Time has not eroded the force of Justice Sutherland's opinion for the Court in *Powell* v. *Alabama*, 287 U. S. 45 (1932):

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.*, at 68–69.

this Court has recognized repeatedly.[9] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[10]

The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated.[11] To hold otherwise

> "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of

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[9] See *United States* v. *Ash*, 413 U. S. 300, 307–308 (1973); *Argersinger* v. *Hamlin*, 407 U. S. 25, 31–32 (1972); *Gideon* v. *Wainwright*, 372 U. S., at 343–345; *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938); *Powell* v. *Alabama*, 287 U. S., at 68–69.

[10] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

[11] "The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has a right to 'Assistance of Counsel [for] his defence.' Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied." *United States* v. *Decoster*, 199 U. S. App. D. C. 359, 382, 624 F. 2d 196, 219 (MacKinnon, J., concurring), cert. denied, 444 U. S. 944 (1979).

assistance of counsel cannot be satisfied by mere formal appointment." *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940) (footnote omitted).

Thus, in *McMann* the Court indicated that the accused is entitled to "a reasonably competent attorney," 397 U. S., at 770, whose advice is "within the range of competence demanded of attorneys in criminal cases." *Id.*, at 771.[12] In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), we held that the Constitution guarantees an accused "adequate legal assistance." *Id.*, at 344. And in *Engle* v. *Isaac*, 456 U. S. 107 (1982), the Court referred to the criminal defendant's constitutional guarantee of "a fair trial and a competent attorney." *Id.*, at 134.

The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question."[13] This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975).[14] It is that "very premise" that underlies and gives meaning to the Sixth

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[12] See also *Wainwright* v. *Sykes*, 433 U. S. 72, 99 (1977) (WHITE, J., concurring in judgment); *id.*, at 117–118 (BRENNAN, J., dissenting); *Tollett* v. *Henderson*, 411 U. S. 258, 266–268 (1973); *Parker* v. *North Carolina*, 397 U. S. 790, 797–798 (1970).

[13] Quoted in Kaufman, Does the Judge Have a Right to Qualified Counsel?, 61 A. B. A. J. 569, 569 (1975).

[14] See also *Polk County* v. *Dodson*, 454 U. S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); *Gardner* v. *Florida*, 430 U. S. 349, 360 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases").

Amendment.[15] It "is meant to assure fairness in the adversary criminal process." *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler* v. *Sullivan*, 446 U. S., at 343.[16]

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the rôle of an advocate." *Anders* v. *California*, 386 U. S. 738, 743 (1967).[17] The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors[18]—the kind of testing envisioned by the Sixth Amendment has occurred.[19] But if the process loses

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[15] "More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." 422 U. S., at 857.

[16] "Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented." *Betts* v. *Brady*, 316 U. S. 455, 476 (1942) (Black, J., dissenting).

[17] See also *Jones* v. *Barnes*, 463 U. S. 745, 758 (1983) (BRENNAN, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation").

[18] See *Engle* v. *Isaac*, 456 U. S. 107, 133–134 (1982); *United States* v. *Agurs*, 427 U. S. 97, 102, n. 5 (1976); *Tollett* v. *Henderson*, 411 U. S., at 267; *Parker* v. *North Carolina*, 397 U. S., at 797–798; *McMann* v. *Richardson*, 397 U. S. 759, 770–771 (1970); *Brady* v. *United States*, 397 U. S. 742, 756–757 (1970).

[19] Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by

its character as a confrontation between adversaries, the constitutional guarantee is violated.[20] As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams* v. *Twomey*, 510 F. 2d 634, 640 (CA7), cert. denied *sub nom. Sielaff* v. *Williams*, 423 U. S. 876 (1975).[21]

III

While the Court of Appeals purported to apply a standard of reasonable competence, it did not indicate that there had been an actual breakdown of the adversarial process during

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attempting a useless charade. See *Nickols* v. *Gagnon*, 454 F. 2d 467, 472 (CA7 1971), cert. denied, 408 U. S. 925 (1972). At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt. And, of course, even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances. See *Tollett* v. *Henderson*, 411 U. S., at 266–268; *Parker* v. *North Carolina*, 397 U. S., at 797–798; *McMann*, 397 U. S., at 770–771. See generally *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363–365 (1978); *North Carolina* v. *Alford*, 400 U. S. 25, 37–38 (1970); *Brady* v. *United States*, 397 U. S., at 750–752.

[20] The Court of Appeals focused on counsel's overall representation of respondent, as opposed to any specific error or omission counsel may have made. Of course, the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well. See *Strickland* v. *Washington*, *post*, at 693–696. Since this type of claim was not passed upon by the Court of Appeals, we do not consider it here.

[21] Thus, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. See *Jones* v. *Barnes*, 463 U. S. 745 (1983); *Morris* v. *Slappy*, 461 U. S. 1 (1983). It is for this reason that we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction. See n. 6, *supra*.

the trial of this case. Instead it concluded that the circumstances surrounding the representation of respondent mandated an inference that counsel was unable to discharge his duties.

In our evaluation of that conclusion, we begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. See *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867–869 (1982); *United States* v. *Morrison*, 449 U. S., at 364–365; *Weatherford* v. *Bursey*, 429 U. S. 545 (1977).[22] Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see *Michel* v. *Louisiana*, 350 U. S. 91, 100–101 (1955), the burden rests on the accused to demonstrate a constitutional violation.[23] There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.[24]

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[22] Cf. *United States* v. *Agurs*, 427 U. S., at 112 (footnote omitted) ("The proper standard of materiality [of a prosecutor's failure to disclose exculpatory evidence] must reflect our overriding concern with the justice of the finding of guilt"). Thus, we do not view counsel's performance in the abstract, but rather the impact of counsel's performance upon "what, after all, is [the accused's], not counsel's trial." *McKaskle* v. *Wiggins*, 465 U. S. 168, 174 (1984).

[23] "Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients." *Matthews* v. *United States*, 518 F. 2d 1245, 1246 (CA7 1975).

[24] See, *e. g.*, *Flanagan* v. *United States*, 465 U. S. 259, 267–268 (1984); *Estelle* v. *Williams*, 425 U. S. 501, 504 (1976); *Murphy* v. *Florida*, 421 U. S. 794 (1975); *Bruton* v. *United States*, 391 U. S. 123, 136–137 (1968); *Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966); *Jackson* v. *Denno*, 378 U. S. 368, 389–391 (1964); *Payne* v. *Arkansas*, 356 U. S. 560, 567–568 (1958); *In re Murchison*, 349 U. S. 133, 136 (1955).

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.[25] Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis* v. *Alaska*, 415 U. S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.*, at 318 (citing *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968), and *Brookhart* v. *Janis*, 384 U. S. 1, 3 (1966)).[26]

Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a

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[25] The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. See, *e. g.*, *Geders* v. *United States*, 425 U. S. 80 (1976); *Herring* v. *New York*, 422 U. S. 853 (1975); *Brooks* v. *Tennessee*, 406 U. S. 605, 612–613 (1972); *Hamilton* v. *Alabama*, 368 U. S. 52, 55 (1961); *White* v. *Maryland*, 373 U. S. 59, 60 (1963) *(per curiam)*; *Ferguson* v. *Georgia*, 365 U. S. 570 (1961); *Williams* v. *Kaiser*, 323 U. S. 471, 475–476 (1945).

[26] Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See *Strickland* v. *Washington*, *post*, at 693–696; see generally *Davis* v. *Alabama*, 596 F. 2d 1214, 1221–1223 (CA5 1979), vacated as moot, 446 U. S. 903 (1980); *Cooper* v. *Fitzharris*, 586 F. 2d 1325, 1332–1333 (CA9 1978) (en banc); *McQueen* v. *Swenson*, 498 F. 2d 207, 219–220 (CA8 1974); *United States ex rel. Green* v. *Rundle*, 434 F. 2d 1112, 1115 (CA3 1970); Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927 (1973); Note, Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review, 13 Colum. J. Law & Social Prob. 1, 76–80 (1977).

fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell* v. *Alabama*, 287 U. S. 45 (1932), was such a case.

The defendants had been indicted for a highly publicized capital offense. Six days before trial, the trial judge appointed "all the members of the bar" for purposes of arraignment. "Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court." *Id.*, at 56. On the day of trial, a lawyer from Tennessee appeared on behalf of persons "interested" in the defendants, but stated that he had not had an opportunity to prepare the case or to familiarize himself with local procedure, and therefore was unwilling to represent the defendants on such short notice. The problem was resolved when the court decided that the Tennessee lawyer would represent the defendants, with whatever help the local bar could provide.

> "The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." *Id.*, at 57–58.

This Court held that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Id.*, at 53. The Court did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the likelihood that counsel could have performed as an effective adversary was so re-

mote as to have made the trial inherently unfair.[27] *Powell* was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial.[28]

But every refusal to postpone a criminal trial will not give rise to such a presumption. In *Avery* v. *Alabama*, 308 U. S. 444 (1940), counsel was appointed in a capital case only three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time, *id.*, at 450–453.[29] Similarly, in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), the Court refused "to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel." *Id.*, at 54.[30]

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[27] "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." 287 U. S., at 58.

[28] See also *Chambers* v. *Maroney*, 399 U. S. 42, 59 (1970) (Harlan, J., concurring in part and dissenting in part); *White* v. *Ragen*, 324 U. S. 760, 764 (1945) *(per curiam); House* v. *Mayo*, 324 U. S. 42, 45 (1945) *(per curiam); Ex parte Hawk*, 321 U. S. 114, 115–116 (1944) *(per curiam).* Ineffectiveness is also presumed when counsel "actively represented conflicting interests." *Cuyler* v. *Sullivan*, 446 U. S. 335, 350 (1980). See *Flanagan* v. *United States*, 465 U. S., at 268. "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway* v. *Arkansas*, 435 U. S. 475, 489–490 (1978). See also *Glasser* v. *United States*, 315 U. S. 60, 67–77 (1942).

[29] See also *Morris* v. *Slappy*, 461 U. S. 1 (1983).

[30] See also *Mancusi* v. *Stubbs*, 408 U. S. 204, 214 (1972).

Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.[31]

The Court of Appeals did not find that respondent was denied the presence of counsel at a critical stage of the prosecution. Nor did it find, based on the actual conduct of the trial, that there was a breakdown in the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution. The dispositive question in this case therefore is whether the circumstances surrounding respondent's representation—and in particular the five criteria identified by the Court of Appeals—justified such a presumption.[32]

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[31] The Government suggests that a presumption of prejudice is justified when counsel is subject to "external constraints" on his performance. In this case the Court of Appeals identified an "external" constraint—the District Court's decision to give counsel only 25 days to prepare for trial. The fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect. Cf. *United States* v. *Agurs*, 427 U. S., at 110 (prosecutorial misconduct should be evaluated not on the basis of culpability but by its effect on the fairness of the trial). That is made clear by *Chambers* and *Avery*. Both cases involved "external constraints" on counsel in the form of court-imposed limitations on the length of pretrial preparation, yet in neither did the Court presume that the "constraint" had an effect on the fairness of the trial. In fact, only last Term we made it clear that with respect to a trial court's refusal to grant the defense additional time to prepare for trial, an "external constraint" on counsel, great deference must be shown to trial courts, because of the scheduling problems they face. See *Morris* v. *Slappy*, 461 U. S., at 11–12. Conversely, we have presumed prejudice when counsel labors under an actual conflict of interest, despite the fact that the constraints on counsel in that context are entirely self-imposed. See *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980).

[32] See generally Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 346–349 (1983);

IV

The five factors listed in the Court of Appeals' opinion are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for concluding that competent counsel was not able to provide this respondent with the guiding hand that the Constitution guarantees.

Respondent places special stress on the disparity between the duration of the Government's investigation and the period the District Court allowed to newly appointed counsel for trial preparation. The lawyer was appointed to represent respondent on June 12, 1980, and on June 19, filed a written motion for a continuance of the trial that was then scheduled to begin on June 30. Although counsel contended that he needed at least 30 days for preparation, the District Court reset the trial for July 14—thus allowing 25 additional days for preparation.

Neither the period of time that the Government spent investigating the case, nor the number of documents that its agents reviewed during that investigation, is necessarily relevant to the question whether a competent lawyer could prepare to defend the case in 25 days. The Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge. Of course, in some cases the rebuttal may be equally burdensome and time consuming, but there is no necessary correlation between the two. In this case, the time devoted by the Government to the assembly, organization, and summarization of the thousands of written records evidencing the two streams of checks flowing between the banks in Florida and Oklahoma unquestionably simplified the work of defense counsel in identifying and un-

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Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053, 1066–1068 (1980); Note, Ineffective Assistance of Counsel: The Lingering Debate, 65 Cornell L. Rev. 659, 681–688 (1980).

derstanding the basic character of the defendants' scheme.[33] When a series of repetitious transactions fit into a single mold, the number of written exhibits that are needed to define the pattern may be unrelated to the time that is needed to understand it.

The significance of counsel's preparation time is further reduced by the nature of the charges against respondent. Most of the Government's case consisted merely of establishing the transactions between the two banks. A competent attorney would have no reason to question the authenticity, accuracy, or relevance of this evidence—there could be no dispute that these transactions actually occurred.[34] As respondent appears to recognize,[35] the only bona fide jury issue open to competent defense counsel on these facts was whether respondent acted with intent to defraud.[36] When

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[33] It is noteworthy that only about 60 exhibits, consisting primarily of bank records and batches of checks, together with summary charts prepared by the Government, were actually introduced at trial.

[34] None of the several lawyers who have represented respondent, including present counsel who has had months to study the record, has suggested that there was any reason to challenge the authenticity, relevance, or reliability of the Government's evidence concerning the transactions at issue.

[35] See Brief for Respondent 56–61.

[36] The mail fraud statute, under which respondent was convicted, provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not

there is no reason to dispute the underlying historical facts, the period of 25 days to consider the question whether those facts justify an inference of criminal intent is not so short that it even arguably justifies a presumption that no lawyer could provide the respondent with the effective assistance of counsel required by the Constitution.[37]

That conclusion is not undermined by the fact that respondent's lawyer was young, that his principal practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior experience in handling, for example, armed robbery prosecutions. The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.[38]

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more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

[37] It is instructive to compare this case to *Powell*, where not only was there in reality no appointment of counsel until the day of trial, but also there was substantial dispute over the underlying historical facts. This case is more like *Avery* and *Chambers* than *Powell*.

[38] We consider in this case only the commands of the Constitution. We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this. It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified. See generally, *e. g.*, Committee to Consider Standards for Admission to Practice in Federal Courts, Final Report, 83 F. R. D. 215 (1979); Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 18–19 (1973); Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Ford. L. Rev. 227 (1973); Burger, Some Further Reflections on the Problem of Adequacy of Trial Counsel, 49 Ford. L. Rev. 1 (1980); Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 Harv. L. Rev. 633 (1980). We address not what is prudent or appropriate, but only what is constitutionally compelled.

The three other criteria—the gravity of the charge, the complexity of the case, and the accessibility of witnesses[39]—are all matters that may affect what a reasonably competent attorney could be expected to have done under the circumstances, but none identifies circumstances that in themselves make it unlikely that respondent received the effective assistance of counsel.[40]

V

This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary. Respondent can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.[41] In this Court, respondent's present counsel argues that the record would support such an attack, but we leave that claim—as well as the other alleged trial errors raised by respondent which were not passed upon

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[39] In this connection, it is worth noting that most of the proof not located in the district in which respondent was tried concerned the largely undisputed historical facts underlying the transactions at issue.

[40] In his brief, respondent goes beyond the factors enumerated by the Court of Appeals in arguing that he did not receive the effective assistance of counsel at trial. For example, respondent points out that trial counsel used notes to assist him during his opening statement to the jury and told the jury it was his first trial. None of these aspects of counsel's representation is so inherently inconsistent with a reasonably effective defense as to justify a presumption that respondent's trial was unfair; indeed they could have been the product of a reasonable tactical judgment.

[41] Since counsel's overall performance was the only question on which the Court of Appeals passed, and is the primary focus of respondent's arguments in this court, we have confined our analysis to a claim challenging counsel's overall performance, and not one based on particular errors or omissions. Should respondent pursue claims based on specified errors made by counsel on remand, they should be evaluated under the standards enunciated in *Strickland* v. *Washington*, *post*, at 693–696.

by the Court of Appeals—for the consideration of the Court of Appeals on remand.[42]

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL concurs in the judgment.

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[42] The Government argues that a defendant can attack the actual performance of trial counsel only through a petition for postconviction relief under 28 U. S. C. § 2255, and not through direct appeal, because ineffective assistance claims are generally not properly raised in the District Court nor preserved for review on appeal. Whatever the merits of this position as a general matter, in this case respondent did raise his claim in the District Court through his motion for new trial under Federal Rule of Criminal Procedure 33. The District Court denied that motion for lack of jurisdiction because the case was pending on direct appeal at the time, but that ruling was erroneous. The District Court had jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case. See *United States* v. *Fuentes-Lozano*, 580 F. 2d 724 (CA5 1978); *United States* v. *Phillips*, 558 F. 2d 363 (CA6 1977) *(per curiam)*; *United States* v. *Ellison*, 557 F. 2d 128, 132 (CA7), cert. denied, 434 U. S. 965 (1977); *United States* v. *Hays*, 454 F. 2d 274, 275 (CA9 1972); *United States* v. *Smith*, 433 F. 2d 149, 151–152 (CA5); *United States* v. *Lee*, 428 F. 2d 917, 923 (CA6), cert. denied, 404 U. S. 1017 (1972); *Guam* v. *Inglett*, 417 F. 2d 123, 125 (CA9 1969); *United States* v. *Hersh*, 415 F. 2d 835, 837 (CA5 1969); *Richardson* v. *United States*, 360 F. 2d 366, 368–369 (CA5 1966); *United States* v. *Comulada*, 340 F. 2d 449, 452 (CA2), cert. denied, 380 U. S. 978 (1965); *Ferina* v. *United States*, 302 F. 2d 95, 107, n. 1 (CA8 1962); *Smith* v. *United States*, 109 U. S. App. D. C. 28, 31–32, 283 F. 2d 607, 610–611 (1960) (Bazelon, J., concurring in result), cert. denied, 364 U. S. 938 (1961); *Zamloch* v. *United States*, 187 F. 2d 854, later proceeding, 193 F. 2d 889 (CA9 1951) *(per curiam)*, cert. denied, 343 U. S. 934 (1952); *Rakes* v. *United States*, 163 F. 2d 771, 772–773 (CA4 1947) *(per curiam)*, later proceeding, 169 F. 2d 739, cert. denied, 335 U. S. 826 (1948); 8A J. Moore, Moore's Federal Practice ¶ 33.03[2] (1983); 3 C. Wright, Federal Practice and Procedure § 557, pp. 338–340 (2d ed. 1982). See also *United States* v. *Johnson*, 327 U. S. 106, 109–110 (1946). The Court of Appeals did not reach this claim of actual ineffectiveness, since it reversed the conviction without considering counsel's actual performance. Accordingly this claim remains open on remand.

STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* WASHINGTON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82–1554. Argued January 10, 1984—Decided May 14, 1984

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." In preparing for the sentencing hearing, defense counsel spoke with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme Court affirmed, and respondent then sought collateral relief in state court on the ground, *inter alia*, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals ultimately reversed, stating that the Sixth Amendment accorded criminal defendants a right

to counsel rendering "reasonably effective assistance given the totality of the circumstances." After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding—such as the one provided by Florida law—that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 684–687.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 687–696.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 687–691.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 691–696.

3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U. S. C. § 2254(d), but is a mixed question of law and fact. Pp. 696–698.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 698–700.

693 F. 2d 1243, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 701. MARSHALL, J., filed a dissenting opinion, *post*, p. 706.

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were *Jim Smith*, Attorney General, and *Calvin L. Fox*, Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was *Joseph H. Rodriguez*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Edwin S. Kneedler*; for the State of Alabama et al. by *Mike Greely*, Attorney General of Montana, and *John H. Maynard*, Assistant Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *John Van de Kamp*, Attorney General of California, *Duane Woodard*, Attorney General of Colorado, *Austin*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which in-

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J. McGuigan, Chief State's Attorney of Connecticut, *Michael J. Bowers*, Attorney General of Georgia, *Tany S. Hong*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Steven L. Beshear*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Francis X. Bellotti*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William A. Allain*, Attorney General of Mississippi, *John D. Ashcroft*, Attorney General of Missouri, *Paul L. Douglas*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, *Robert Wefald*, Attorney General of North Dakota, *Anthony Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *Dave Frohnmayer*, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Dennis J. Roberts II*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *William M. Leech, Jr.*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *John J. Easton*, Attorney General of Vermont, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Chauncey H. Browning*, Attorney General of West Virginia, and *Archie G. McClintock*, Attorney General of Wyoming; and for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Nicholas E. Calio*.

Richard J. Wilson, *Charles S. Sims*, and *Burt Neuborne* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

cluded three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50–53. He also stated, however, that he accepted responsibility for the crimes. *E. g.*, *id.*, at 54, 57. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. *Id.*, at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on

the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id.*, at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See *id.*, at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. *Id.*, at A223–A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." *Id.*, at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227–A228, A265–A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. *Id.*, at A265–A266. Counsel also argued that respondent had no history of criminal activity and that respondent com-

mitted the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's

participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." See *Washington* v. *State*, 362 So. 2d 658, 663–664 (Fla. 1978) (quoting trial court findings), cert. denied, 441 U. S. 937 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influ-

ence of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. App. 7; see also *id.*, at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206–A243. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. *Id.*, at A218–A220. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. *Id.*, at A226–A228. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. *Id.*, at A228. Fourth, there was no error in failure to examine the medical examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. *Id.*, at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three

reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in *Knight* v. *State*, 394 So. 2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: "[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the . . . things [that respondent alleged counsel had failed to do]

at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely *overwhelming* . . . ." App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. *Washington* v. *State*, 397 So. 2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice" and, indeed, had "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief . . . ." *Id.*, at 287. Respondent's claims were "shown conclusively to be without merit so as to obviate the need for an evidentiary hearing." *Id.*, at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a continuance, as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to

investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that "there does not appear to be a likelihood, or even a significant possibility," that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285–A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. *Id.*, at A286–A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F. 2d 879 (1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F. 2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F. 2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of *Rose* v. *Lundy*, 455 U. S. 509 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity rather than a matter of jurisdiction" and hence admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F. 2d, at 1248, n. 7.

Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Id.*, at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. *Id.*, at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he amount of pretrial investigation that is reasonable defies precise measurement." *Id.*, at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. *Id.*, at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include "'an independent examination of the facts, circumstances, pleadings and laws involved.'" *Id.*, at 1253 (quoting *Rummel* v. *Estelle*, 590 F. 2d 103, 104 (CA5 1979)). The scope of the duty, however, depends

on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F. 2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. *Id.*, at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. *Id.*, at 1257–1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.*, at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id.*, at 1256–1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the question of the prejudice to the

defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. *Id.*, at 1258–1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." *Id.*, at 1262. This standard, the Court of Appeals reasoned, is compatible with the "cause and prejudice" standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified showing of prejudice would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. *Id.*, at 1260–1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, *id.*, at 1264–1280 (opinion of Tjoflat, J.); *id.*, at 1280 (opinion of Clark, J.); *id.*, at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); *id.*, at 1288–1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, *id.*, at 1281–1285 (opinion of Johnson, J., joined by Anderson, J.); *id.*, at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); *id.*, at 1288–1291 (opinion of Hill, J.), a majority

of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible "to the extent that it contains personal knowledge of historical facts or expert opinion," was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. *Id.*, at 1262–1263; see *Fayerweather* v. *Ritch*, 195 U. S. 276, 306–307 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. *E. g.*, *United States* v. *Cronic*, *ante*, p. 648. With the exception of *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. Cf. *United States* v. *Agurs*, 427 U. S. 97, 102, n. 5 (1976).

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See *Trapnell* v. *United States*, 725 F. 2d 149, 151–152 (CA2 1983); App. B to Brief for United States in *United States* v. *Cronic*, O. T. 1983, No. 82–660, pp. 3a–6a; Sarno,

Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99–157, §§ 7–10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in *United States* v. *Cronic*, *supra*, at 7a–10a; Sarno, *supra*, at 83–99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in *United States* v. *Decoster*, 199 U. S. App. D. C. 359, 371, 374–375, 624 F. 2d 196, 208, 211–212 (en banc), cert. denied, 444 U. S. 944 (1979), and adopted by the State of Florida in *Knight* v. *State*, 394 So. 2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F. 2d, at 1261–1262.

For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U. S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See *Rose* v. *Lundy*, 455 U. S., at 515–520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes *Powell* v. *Alabama*, 287 U. S. 45 (1932), *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through

the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275, 276 (1942); see *Powell* v. *Alabama*, *supra*, at 68–69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972); *Gideon* v. *Wainwright*, *supra*; *Johnson* v. *Zerbst*, *supra*. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, *e. g.*, *Geders* v. *United States*, 425 U. S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York*, 422 U. S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U. S. 605, 612–613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U. S. 570, 593–596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," *Cuyler* v. *Sullivan*, 446 U. S., at 344. *Id.*, at 345–350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see *Barclay*

v. *Florida*, 463 U. S. 939, 952–954 (1983); *Bullington* v. *Missouri*, 451 U. S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See *Trapnell* v. *United States*, 725 F. 2d, at 151–152. The Court indirectly recognized as much when it stated in *McMann* v. *Richardson*, *supra*, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also *Cuyler* v. *Sullivan*, *supra*, at 344. When a convicted de-

fendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *Michel* v. *Louisiana*, 350 U. S. 91, 100–101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler* v. *Sullivan*, *supra*, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell* v. *Alabama*, 287 U. S., at 68–69.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e. g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take

account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States* v. *Decoster*, 199 U. S. App. D. C., at 371, 624 F. 2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle* v. *Isaac*, 456 U. S. 107, 133–134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel* v. *Louisiana*, *supra*, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster,

The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strate-

gic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States* v. *Decoster*, *supra*, at 372–373, 624 F. 2d, at 209–210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States* v. *Morrison*, 449 U. S. 361, 364–365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to en-

sure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States* v. *Cronic*, *ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler* v. *Sullivan*, 446 U. S., at 345–350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e. g.*, Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, *supra*, at 350, 348 (footnote omitted).

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 866–867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceed-

ings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as *Amicus Curiae* 19–20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. *United States* v. *Johnson*, 327 U. S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States* v. *Agurs*, 427 U. S., at 104, 112–113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States* v. *Valenzuela-Bernal*, *supra*, at 872–874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to

be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. *Trapnell* v. *United States*, 725 F. 2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different

formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See *United States* v. *Frady*, 456 U. S. 152, 162–169 (1982); *Engle* v. *Isaac*, 456 U. S. 107, 126–129 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see *id.*,

at 126, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U. S. C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend* v. *Sain*, 372 U. S. 293, 309, n. 6 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See *Cuyler* v. *Sullivan*, 446 U. S., at 342. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291–292 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see *supra*, at 671–678, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the

challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383–384, 400–401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the

sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted *supra*, at 695, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings.[1]

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[1] The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with *Gregg* v. *Georgia*, 428 U. S. 153 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. *Pulley* v. *Harris*, 465 U. S. 37, 59 (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see *Furman* v. *Georgia*, 408 U. S. 238, 274–277 (1972) (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U. S. 183, 248–312 (1971) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See *Wainwright* v. *Adams*, *post*, at 965 (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding . . . decision [to vacate stay] is degrading to our role as judges"); *Autry* v. *McKaskle*, 465 U. S. 1085 (1984) (MARSHALL, J., dissenting) (criticizing Court for "dramatically expediting its normal deliberative processes to clear the way for an impending execution"); *Stephens* v. *Kemp*, 464 U. S. 1027, 1032 (1983) (POWELL, J., dissenting) (contending that procedures by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to follow"); *Sullivan* v. *Wainwright*, 464 U. S. 109, 112 (1983) (BURGER, C. J., concurring) (accusing lawyers seeking review of their client's death sentences of turning "the

I

This case and *United States* v. *Cronic*, *ante*, p. 648, present our first occasions to elaborate the appropriate standards for judging claims of ineffective assistance of counsel. In *Cronic*, the Court considers such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," *ante*, at 661. This case, in contrast, concerns claims of ineffective assistance based on allegations of specific errors by counsel—claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding. Accordingly, a defendant making a claim of this kind must show not only that his lawyer's performance was inadequate but also that he was prejudiced thereby. See also *Cronic*, *ante*, at 659, n. 26.

I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law. Like all federal courts and most state courts that have previously addressed the matter, see *ante*, at 683–684, the Court concludes that "the proper standard for attorney performance is that of reasonably effective assistance." *Ante*, at 687. And,

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administration of justice into [a] sporting contest"); *Autry* v. *Estelle*, 464 U. S. 1, 6 (1983) (STEVENS, J., dissenting) (suggesting that Court's practice in reviewing applications in death cases "injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error"). It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court.

rejecting the strict "outcome-determinative" test employed by some courts, the Court adopts as the appropriate standard for prejudice a requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 694. I believe these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind.

With respect to the performance standard, I agree with the Court's conclusion that a "particular set of detailed rules for counsel's conduct" would be inappropriate. *Ante*, at 688. Precisely because the standard of "reasonably effective assistance" adopted today requires that counsel's performance be measured in light of the particular circumstances of the case, I do not believe our decision "will stunt the development of constitutional doctrine in this area," *post*, at 709 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is largely consistent with the approach taken by the lower courts, *ante*, at 696, simply indicates that those courts may continue to develop governing principles on a case-by-case basis in the common-law tradition, as they have in the past. Similarly, the prejudice standard announced today does not erect an insurmountable obstacle to meritorious claims, but rather simply requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. *Ante*, at 695.[2]

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[2] Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See *Cronic*, *ante*, at 659–660;

II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that "'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U. S., at 188–189 (opinion of Stewart, POWELL, and STEVENS, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact-finding. As JUSTICE MARSHALL emphasized last Term:

> "This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), it recognized that right in capital cases, *Powell* v. *Alabama*, 287 U. S. 45, 71–72 (1932). Time

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Javor v. *United States*, 724 F. 2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, *e. g.*, *Bullington* v. *Missouri*, 451 U. S. 430 (1981); *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*; *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). . . .

"Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' *Ibid.*" *Barefoot* v. *Estelle*, 463 U. S. 880, 913–914 (1983) (dissenting opinion).

See also *id.*, at 924 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings* v. *Oklahoma*, 455 U. S., at 112. In fact, as JUSTICE O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." *Id.*, at 117, n., and 119 (O'CONNOR, J., concurring).

Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum. L. Rev. 1544, 1549 (1983). See, *e. g.*, *Burger* v. *Zant*, 718 F. 2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, *post*, at 902. Accordingly, counsel's general duty to investigate, *ante*, at 690, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that "'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Eddings* v. *Oklahoma*, *supra*, at 112 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

JUSTICE MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assist-

ance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance.[1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." *Ante*, at 688. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. *Ante*, at 694. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave

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[1] See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States* v. *Decoster*, 93 Harv. L. Rev. 752, 756–758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1386–1387, 1399–1401, 1408–1410 (1983).

"reasonably" and must act like "a reasonably competent attorney," *ante*, at 687, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsiblity to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?[2] The majority offers no clues as to the proper responses to these questions.

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take ac-

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[2] Cf., *e. g.*, *Moore* v. *United States*, 432 F. 2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

count of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Ante*, at 688–689. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see *ante*, at 689; cf. *infra*, at 712, 713, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F. 2d 1243, 1251–1258 (CA5 1982) (en banc). For other, generally consistent efforts, see *United States* v. *Decoster*, 159 U. S. App. D. C. 326, 333–334, 487 F. 2d 1197, 1203–1204 (1973), disapproved on rehearing, 199 U. S. App. D. C. 359, 624 F. 2d 196 (en banc), cert. denied, 444 U. S. 944 (1979); *Coles* v. *Peyton*, 389 F. 2d 224, 226 (CA4), cert. denied, 393 U. S. 849 (1968); *People* v. *Pope*, 23 Cal. 3d 412, 424–425, 590 P. 2d 859, 866 (1979); *State* v. *Harper*, 57 Wis. 2d 543, 550–557, 205 N. W. 2d 1, 6–9 (1973).[3] By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

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[3] For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims, see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Crim. L. Rev. 233, 242–248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4–1.1—4–8.6 (2d ed. 1980).

B

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[4] In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

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[4] *Cf. United States* v. *Ellison*, 557 F. 2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed:

"[T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway* v. *Arkansas*, 435 U. S. 475, 490–491 (1978) (emphasis in original).

When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.[5] The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

In *Chapman* v. *California*, 386 U. S. 18, 23 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. *Id.*, at 23, n. 8; see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).[6] In my view, the right

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[5] See *United States* v. *Decoster*, 199 U. S. App. D. C. 359, 454–457, 624 F. 2d 196, 291–294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U. S. 944 (1979); Note, 93 Harv. L. Rev., at 767–770.

[6] In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In *Glasser* v. *United States*, 315 U. S. 60, 75–76 (1942), for example, we held:

"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As the Court today acknowledges, *United States* v. *Cronic*, *ante*, at 662, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

to *effective* assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.[7] I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. *Ante*, at 689. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. *Ibid.* The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, *ibid.*; see *ante*, at 690, 696, and should "appl[y] a heavy measure of deference to counsel's judgments," *ante*, at 691.

I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I

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[7] See *United States* v. *Yelardy*, 567 F. 2d 863, 865, n. 1 (CA6), cert. denied, 439 U. S. 842 (1978); *Beasley* v. *United States*, 491 F. 2d 687, 696 (CA6 1974); *Commonwealth* v. *Badger*, 482 Pa. 240, 243–244, 393 A. 2d 642, 644 (1978).

would agree. See *United States* v. *Cronic*, *ante*, at 658. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," *ante*, at 688, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See *ante*, at 690. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard,[3] while others have adopted various versions of

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[3] See, *e. g.*, *State* v. *Pacheco*, 121 Ariz. 88, 91, 588 P. 2d 830, 833 (1978); *Hoover* v. *State*, 270 Ark. 978, 980, 606 S. W. 2d 749, 751 (1980); *Line* v. *State*, 272 Ind. 353, 354–355, 397 N. E. 2d 975, 976 (1979).

the "reasonable competence" standard.[9] On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test,[10] to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant.[11]

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, *ante*, at 687–691, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, *ante*, at 691–696.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See *ante*, at 696–697. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the majority says can relieve lower courts that hith-

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[9] See, *e. g.*, *Trapnell* v. *United States*, 725 F. 2d 149, 155 (CA2 1983); *Cooper* v. *Fitzharris*, 586 F. 2d 1325, 1328–1330 (CA9 1978) (en banc), cert. denied, 440 U. S. 974 (1979).

[10] See, *e. g.*, *United States* v. *Decoster*, 199 U. S. App. D. C., at 370, and n. 74, 624 F. 2d, at 208, and n. 74 (plurality opinion); *Knight* v. *State*, 394 So. 2d 997, 1001 (Fla. 1981).

[11] See n. 7, *supra*.

erto have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." *Ante*, at 687. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion) (footnote omitted).[12]

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that information and presenting it

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[12] See also *Zant* v. *Stephens*, 462 U. S. 862, 884–885 (1983); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion).

in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts,[13] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.[14]

It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. JUSTICE BRENNAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, "reasonableness under prevailing professional norms," in a manner that takes into account the nature of the impending penalty. *Ante*, at 704–706. Though I would prefer a more specific iteration of counsel's duties in this special context,[15] I can accept that proposal. However, when instructing lower courts regarding the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself.[16] In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable prob-

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[13] See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 303 (1983).

[14] As JUSTICE BRENNAN points out, *ante*, at 704, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial.

[15] See Part I–A, *supra*. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, *supra*, at 343–345, 360–362.

[16] For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I–B, *supra*.

ability" that he would have been given a life sentence if his lawyer had been competent, see *ante*, at 694; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. *United States* v. *Agurs*, 427 U. S. 97, 121–122 (1976) (MARSHALL, J., dissenting).[17]

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us.[18] It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, nonviolent man, devoted to his family, and active in the affairs of his church. See App. 338–365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

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[17] As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 694. In view of the nature of the sanction at issue, and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to "undermine confidence" in that outcome than would be true in an ordinary criminal case.

[18] Adhering to my view that the death penalty is unconstitutional under all circumstances, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 300–303, 334–335 (1983). The State makes a colorable—though in my view not compelling—argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsiblity for their actions.[19] But however justifiable such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life, see App. 383–384, 400–401.

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[19] Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgment that he was responsible for his behavior. Second, the Florida Supreme Court possesses—and frequently exercises—the power to overturn death sentences it deems unwarranted by the facts of a case. See *State* v. *Dixon*, 283 So. 2d 1, 10 (1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see *ante*, at 700, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life.[20] Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases "in which, even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." *Barclay* v. *Florida*, 463 U. S. 939, 964 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

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[20] See, *e. g.*, Farmer & Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N–33, N–45 (1980).

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL–CIO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83–1202. Decided May 14, 1984

In May 1978, the National Labor Relations Board found that respondent union had violated the National Labor Relations Act by discriminating against nonmembers in its hiring hall referral practices. The Board ordered the union to compensate the five charging parties and other "similarly situated" employees for lost earnings, to be calculated according to a formula established by the Board. In May 1979, the Court of Appeals granted enforcement of the Board's order. The Board then began preparation of a backpay specification, to identify employees who had been subjected to discrimination and to determine the amount of backpay due to each employee. However, for various reasons preparation of the backpay specification was delayed, and in 1982 the Court of Appeals ordered the Board to enter the specification by December 31, 1982. On December 21, 1982, the Board submitted its specification, but it later revised the specification to incorporate more complete information. Ultimately, in July 1983, the Court of Appeals modified the Board's order to require that the union tender backpay only to the charging parties and only as calculated by the backpay specification of December 21, 1982. The court gave as its justification for modifying the Board's order "the length of time that elapsed since the entry of [the court's] original judgment."

Held: The Court of Appeals may not refuse to enforce the backpay order merely because of the Board's delay subsequent to that order in formulating a backpay specification. *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258. "[T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees." *Id.*, at 265. By restricting the beneficiaries of the Board's remedy and abridging procedures lawfully established by the Board for determining the amount of backpay, the Court of Appeals' order under review punishes employees for the Board's nonfeasance.

Certiorari granted; 598 F. 2d 611, reversed and remanded.

PER CURIAM.

This case presents the question whether the Court of Appeals may modify an award of backpay by the National Labor Relations Board on the grounds that the Board failed promptly to specify the amounts of the award. As the decision of the Court of Appeals apparently is inconsistent with this Court's precedents, we grant the petition for writ of certiorari and reverse.

I

Respondent, Local 480 of the International Association of Bridge, Structural & Ornamental Ironworkers, AFL–CIO, operates a hiring hall for construction workers in northern New Jersey. The lengthy procedural history of the present case begins in May 1978 with the Board's finding that the Local had violated §§ 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U. S. C. §§ 158(b)(1)(A) and (2), by discriminating against nonmembers in its hiring hall referral practices.[1] The Board ordered the Local to compensate the

[1] Section 158(b) prohibits various unfair labor practices by labor organizations. That subsection provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . ."

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 158(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 157, as relevant here, protects the right to refrain from union activity.

A 1972 consent decree generally obligates respondent Local to refer applicants to jobs in order of registration at the hiring hall. The Local unlawfully discriminated in favor of its own members by referring them

five charging parties and other "similarly situated" employees for earnings lost because of discrimination. *Ironworkers, Local 480*, 235 N. L. R. B. 1511 (1978). The lost earnings were to be calculated according to a formula established by the Board.[2] On May 11, 1979, the Court of Appeals for the Third Circuit granted enforcement of the Board's order. 598 F. 2d 611.

The Board then began preparation of a backpay specification.[3] To identify employees who had been subject to discrimination, the Board's Regional Office employed the General Services Administration to conduct a computer analysis of respondent's records. The computer was to perform the laborious task of comparing the sign-up dates and qualifications of nonunion members with those of all union members who had been referred ahead of them.[4] Until October 1980, the union slowed the process by refusing to permit photocopying of relevant records. Preparation of the backpay specification was further delayed when the Regional Office in February 1981 discovered a substantial computer error that would require that the entire analysis be performed again at great expense to the Board. After settlement negotiations proved fruitless, the Board authorized reanalysis of the computer data.

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for steward positions instead of equally qualified and previously registered nonmembers.

[2] Under the formula, "the overall earnings of all applicants, members and nonmembers, seeking employment through [the] referral system would be divided by the total number of ironworkers who worked out of the hiring hall, taking into account the net earnings of the individual discriminatees during the relevant period." App. to Pet. for Cert. 21a–22a.

[3] The Board prepares a backpay specification after issuance of an unfair labor practice order that awards backpay. The specification shows in detail how backpay is computed and serves to initiate supplemental administrative proceedings by giving notice of the amount allegedly due. See generally 29 CFR §§ 102.52–102.59 (1983).

[4] The analysis was further complicated by the Board's decision to consolidate the backpay specification for the present case with those for four similar cases of discrimination by other New Jersey locals of the International Ironworkers Association.

In April 1982, as no backpay specification yet had issued, the Local filed a motion seeking relief from that part of the Court of Appeals order of May 11, 1979, that directed backpay for nonmember applicants "similarly situated" to the five charging parties. The Local urged that the lengthy delay in issuance of the specification demonstrated that the Board's order would be impossible to implement. Further, the Local contended that it had ceased discriminatory activity, that no "similarly situated" workers had come forward to allege discrimination, and that the Board's delay in resolving the case had impaired the Local's operations. The Court of Appeals on May 13, 1982, denied the motion "without prejudice to renew such motion after 90 days." App. to Pet. for Cert. 7a–8a.

The Local renewed the motion on September 29, 1982. The General Counsel at that time estimated that the backpay specifications for similarly situated discriminatees would be completed by April 1983. The Court of Appeals, however, ordered the Board to enter its formal backpay specification by December 31, 1982.

To comply with this order, the Board set about preparing a separate list of employees who had suffered discrimination at respondent's hiring hall. In estimating the amount of backpay due to each employee, it was necessary for the Board to obtain information as to earnings that was available only from the Ironworkers Pension and Welfare Fund. The Fund refused to provide the Board with this information without a subpoena or court order. Uncertain that such litigation successfully could be concluded in time to meet the deadline set by court order, the Board prepared a specification based upon projections from records of earnings that it had available. The Board submitted its Specification and Notice of Hearing on December 21, 1982, and set the case for May 16, 1983. The Board later obtained the Fund's earnings records pursuant to an investigatory subpoena and revised its specification to incorporate complete information on actual earnings. The revision decreased by one-fourth the Local's liability.

On February 25, 1983, respondent filed its third motion for relief from the original backpay judgment, requesting the court to require backpay only for named parties or to terminate the proceedings altogether. The Local contended that the Board's specification of December 21, 1982, because it was not based upon actual earnings, was inconsistent with the Board's rules and with the Board's original backpay order. Further, the Local argued that the specification was "punitive" because the total liability exceeded the Local's ability to pay. On July 27, 1983, the Court of Appeals modified the Board's order to require that the Local tender backpay only to the charging parties and only as calculated by the backpay specification of December 21, 1982.[5]

II

The Court of Appeals gave as its justification for modifying the Board's order "the length of time that elapsed since the entry of [the court's] original judgment." App. to Pet. for Cert. 1a. It is well established, however, that the Court of Appeals may not refuse to enforce a backpay order merely because of the Board's delay subsequent to that order in formulating a backpay specification. *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969).

The present case in some respects differs from *Rutter-Rex*. In *Rutter-Rex*, the Court of Appeals cut off the accrual of backpay at an earlier date than had the Board. *Id.*, at 263. In the present case, the Court of Appeals has limited the

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[5] The court's order stated:

"[A]fter a review of the various orders entered in this matter, and the length of time that elapsed since the entry of the original judgment of this Court, it is ordered that:

"1. Any backpay specifications not made by December 31, 1982, are hereby barred and are not to be considered. See order of court dated December 1, 1982.

"2. Payment in full by the Union of any claims asserted on behalf of [the charging parties] shall be considered compliance with paragraph 1 of this order." App. to Pet. for Cert. 1a–2a.

class of employees to whom backpay may be awarded and has prohibited the Board from amending its backpay specification as the Board's regulations would permit, see 29 CFR § 102.57 (1983). Nonetheless, the principle of *Rutter-Rex* remains applicable: "[T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees. . . ." 396 U. S., at 265. By restricting the beneficiaries of the Board's remedy and abridging procedures lawfully established by the Board for determining the amount of backpay, the order under review punishes employees for the Board's nonfeasance.[6] This *Rutter-Rex* forbids.[7]

It is not entirely clear that the order of the Court of Appeals was premised simply upon the Board's delay. The text of the order only hints at the court's reasoning. Respondent had argued before the Court of Appeals that the Board's long delay further demonstrated the impossibility of identifying the employees who had been subject to discrimination and of performing the calculations required by the Board's backpay formula. Respondent also had contended that the Board's specification of December 21, 1982, showed that the Board's order was "punitive" and "confiscatory." App. to Pet. for

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[6] Such a result is anomalous where there is some suggestion, as in the present case, that the wrongdoing union or employer itself contributed to delay by obstructing the Board's processes. Yet, we must acknowledge that one must be sympathetic to respondent union's loss of patience with what appears to be the Board's serious delay.

[7] This case also differs from *Rutter-Rex* in that the Court of Appeals here had issued an order that set a deadline for entry of a formal backpay specification. *Rutter-Rex* recognized the power of the courts of appeals to compel Board action that has been "unreasonably delayed." 396 U. S., at 266, and n. 3. Cf. *Silverman* v. *NLRB*, 543 F. 2d 428 (CA2 1976) (order mandating timely completion of backpay proceedings). In the present case, however, the Board complied with the court's deadline. Nor does it appear that the Board, by subsequently amending the specification, came into noncompliance. The Court of Appeals order of December 1, 1982, did not limit in any way the authority of the Board to amend the specifications during the course of backpay proceedings. It was sufficient that the specification initiated these proceedings.

Cert. 63a. We do not consider whether the Court of Appeals on these grounds may modify its original judgment enforcing the Board's order. Nor do we foreclose challenges that might be raised to the conduct or outcome of the supplemental backpay proceedings.

But as it appears that the Court of Appeals may have rested the judgment under review simply upon the failure of the Board to act promptly, that judgment must be reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL dissents from this opinion deciding this case without briefing on the merits or oral argument.

MASSACHUSETTS *v.* UPTON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 83–1338. Decided May 14, 1984

City police officers, executing a search warrant for a motel room reserved by Richard Kelleher, discovered several items of identification, including credit cards, belonging to two persons whose homes had recently been burglarized, but other items taken in the burglaries, such as jewelry, silver, and gold, were not found. About three hours later, one of the officers received a phone call from an unidentified female who told him that a motor home containing stolen items, including jewelry, silver, and gold, was parked behind respondent's home; that respondent had purchased the items from Kelleher; and that respondent was going to move the motor home because of the search of the motel room. The caller also stated that she had seen the stolen items but refused to identify herself because "he'll [referring to respondent] kill me." When the officer told the caller that he knew her name because he had met her and she had been identified as respondent's girlfriend, the caller admitted her identity and told the officer that she had broken up with respondent and "wanted to burn him." Following the call, the officer verified that a motor home was parked on the property and, while other officers watched the premises, prepared an application for a search warrant, setting out the information noted above in an affidavit and also attaching police reports on the two prior burglaries and lists of the stolen property. A Magistrate issued the warrant, and a subsequent search of the motor home produced the items described by the caller and other incriminating evidence. The discovered evidence led to respondent's conviction on multiple counts of burglary, receiving stolen property, and related crimes. However, the Massachusetts Supreme Judicial Court held that the warrant violated the Fourth Amendment because it was not supported by a sufficient showing of probable cause and reversed respondent's convictions. It interpreted *Illinois* v. *Gates*, 462 U. S. 213, as merely refining the previous "two-pronged" test—which related to an informant's "basis of knowledge" and its "reliability"—by allowing corroboration of the informant's tip to make up for a failure to satisfy the two-pronged test. The court concluded that the two-pronged test was not met here, and that there was insufficient corroboration of the informant's tip.

Held: The two-pronged test was rejected in *Gates*, which instead held that the Fourth Amendment's requirement of probable cause for the issuance of a warrant is to be applied, not according to a fixed and rigid formula, but rather in the light of the "totality of the circumstances" made known to the magistrate, and which emphasized that the task of a reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is sufficient evidence to provide a "substantial basis" for the magistrate's decision to issue the warrant. When properly examined in light of *Gates*, the officer's affidavit in this case provided a substantial basis for the Magistrate's issuance of the warrant.

Certiorari granted; 390 Mass. 562, 458 N. E. 2d 717, reversed and remanded.

PER CURIAM.

Last Term, in *Illinois* v. *Gates*, 462 U. S. 213 (1983), we held that the Fourth Amendment's requirement of probable cause for the issuance of a warrant is to be applied, not according to a fixed and rigid formula, but rather in the light of the "totality of the circumstances" made known to the magistrate. We also emphasized that the task of a reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant. In this case, the Supreme Judicial Court of Massachusetts, interpreting the probable-cause requirement of the Fourth Amendment to the United States Constitution, continued to rely on the approach set forth in cases such as *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969). 390 Mass. 562, 458 N. E. 2d 717 (1983). Since this approach was rejected in *Gates*, we grant the petition for certiorari in this case and reverse the judgment of the Supreme Judicial Court.

At noon on September 11, 1980, Lieutenant Beland of the Yarmouth Police Department assisted in the execution of a search warrant for a motel room reserved by one Richard Kelleher at the Snug Harbor Motel in West Yarmouth. The search produced several items of identification, including

credit cards, belonging to two persons whose homes had recently been burglarized. Other items taken in the burglaries, such as jewelry, silver, and gold, were not found at the motel.

At 3:20 p. m. on the same day, Lieutenant Beland received a call from an unidentified female who told him that there was "a motor home full of stolen stuff" parked behind #5 Jefferson Ave., the home of respondent George Upton and his mother. She stated that the stolen items included jewelry, silver, and gold. As set out in Lieutenant Beland's affidavit in support of a search warrant:

> "She further stated that George Upton was going to move the motor home any time now because of the fact that Ricky Kelleher's motel room was raided and that George [Upton] had purchased these stolen items from Ricky Kelleher. This unidentified female stated that she had seen the stolen items but refused to identify herself because 'he'll kill me,' referring to George Upton. I then told this unidentified female that I knew who she was, giving her the name of Lynn Alberico, who I had met on May 16, 1980, at George Upton's repair shop off Summer St., in Yarmouthport. She was identified to me by George Upton as being his girlfriend, Lynn Alberico. The unidentified female admitted that she was the girl that I had named, stating that she was surprised that I knew who she was. She then told me that she'd broken up with George Upton and wanted to burn him. She also told me that she wouldn't give me her address or phone number but that she would contact me in the future, if need be." See 390 Mass., at 564 n. 2, 458 N. E. 2d, at 718, n. 2.

Following the phone call, Lieutenant Beland went to Upton's house to verify that a motor home was parked on the property. Then, while other officers watched the premises, Lieutenant Beland prepared the application for a search war-

rant, setting out all the information noted above in an accompanying affidavit. He also attached the police reports on the two prior burglaries, along with lists of the stolen property. A Magistrate issued the warrant, and a subsequent search of the motor home produced the items described by the caller and other incriminating evidence. The discovered evidence led to Upton's conviction on multiple counts of burglary, receiving stolen property, and related crimes.

On appeal to the Supreme Judicial Court, respondent argued that the search warrant was not supported by a sufficient showing of "probable cause" under the Fourth Amendment. With respect to our *Gates* opinion, that court said:

> "It is not clear that the *Gates* opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants. Looking at what the Court did on the facts before it, and rejecting an expansive view of certain general statements not essential to the decision, we conclude that the *Gates* opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards." 390 Mass., at 568, 458 N. E. 2d, at 720.

Prior to *Gates*, the Fourth Amendment was understood by many courts to require strict satisfaction of a "two-pronged test" whenever an affidavit supporting the issuance of a search warrant relies on an informant's tip. It was thought that the affidavit, first, must establish the "basis of knowledge" of the informant—the particular means by which he came by the information given in his report; and, second, that it must provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in the particular case. The Massachusetts court apparently viewed *Gates* as merely adding a new wrinkle to this two-pronged test: where an informant's veracity and/or basis of knowledge are not sufficiently clear, substantial corroboration of the tip may save an otherwise invalid warrant.

"We do not view the *Gates* opinion as decreeing a standardless 'totality of the circumstances' test. The informant's veracity and the basis of his knowledge are still important but, where the tip is adequately corroborated, they are not elements indispensible *[sic]* to a finding of probable cause. It seems that, in a given case, the corroboration may be so strong as to satisfy probable cause in the absence of any other showing of the informant's 'veracity' and any direct statement of the 'basis of [his] knowledge.'" 390 Mass., at 568, 458 N. E. 2d, at 721.

Turning to the facts of this case, the Massachusetts court reasoned, first, that the basis of the informant's knowledge was not "forcefully apparent" in the affidavit. *Id.*, at 569, 458 N. E. 2d, at 721. Although the caller stated that she had seen the stolen items and that they were in the motor home, she did not specifically state that she saw them in the motor home. Second, the court concluded that "[n]one of the common bases for determining the credibility of an informant or the reliability of her information is present here." *Ibid.* The caller was not a "tried and true" informant, her statement was not against penal interest, and she was not an "ordinary citizen" providing information as a witness to a crime. "She was an anonymous informant, and her unverified assent to the suggestion that she was Lynn Alberico does not take her out of that category." *Id.*, at 570, 458 N. E. 2d, at 722.

Finally, the court felt that there was insufficient corroboration of the informant's tip to make up for its failure to satisfy the two-pronged test. The facts that tended to corroborate the informant's story were that the motor home was where it was supposed to be, that the caller knew of the motel raid which took place only three hours earlier, and that the caller knew the name of Upton and his girlfriend. But, much as the Supreme Court of Illinois did in the opinion we reviewed in *Gates*, the Massachusetts court reasoned that each item of corroborative evidence either related to innocent, nonsuspicious conduct or related to an event that took place in

public. To sustain the warrant, the court concluded, more substantial corroboration was needed. The court therefore held that the warrant violated the Fourth Amendment to the United States Constitution and reversed respondent's convictions.

We think that the Supreme Judicial Court of Massachusetts misunderstood our decision in *Gates*. We did not merely refine or qualify the "two-pronged test." We rejected it as hypertechnical and divorced from "the factual and practical considerations of everday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949). Our statement on that score was explicit. "[W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations." *Gates*, 462 U. S., at 238. This "totality-of-the-circumstances" analysis is more in keeping with the "practical, common-sense decision" demanded of the magistrate. *Ibid.*

We noted in *Gates* that "the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." *Id.*, at 234–235 (footnote omitted). This, we think, is the error of the Massachusetts court in this case. The court did not consider Lieutenant Beland's affidavit in its entirety, giving significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unreliability) attending the tip. Instead, the court insisted on judging bits and pieces of information in isolation against the artificial standards provided by the two-pronged test.

The Supreme Judicial Court also erred in failing to grant any deference to the decision of the Magistrate to issue a warrant. Instead of merely deciding whether the evidence

viewed as a whole provided a "substantial basis" for the Magistrate's finding of probable cause, the court conducted a *de novo* probable-cause determination. We rejected just such after-the-fact, *de novo* scrutiny in *Gates*. *Id.*, at 236. "A grudging or negative attitude by reviewing courts toward warrants," *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965), is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case. *Gates*, *supra*, at 237, n. 10.* A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.

Examined in light of *Gates*, Lieutenant Beland's affidavit provides a substantial basis for the issuance of the warrant. No single piece of evidence in it is conclusive. But the pieces fit neatly together and, so viewed, support the Magistrate's determination that there was "a fair probability that contraband or evidence of a crime" would be found in Upton's motor home. 462 U. S., at 238. The informant claimed to have seen the stolen goods and gave a description of them which tallied with the items taken in recent burglaries. She knew of the raid on the motel room—which produced evidence connected to those burglaries—and that the room had been reserved by Kelleher. She explained the connection between

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*"If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.' *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977)." *Gates*, 462 U. S., at 236.

Kelleher's motel room and the stolen goods in Upton's motor home. And she provided a motive both for her attempt at anonymity—fear of Upton's retaliation—and for furnishing the information—her recent breakup with Upton and her desire "to burn him."

The Massachusetts court dismissed Lieutenant Beland's identification of the caller as a mere "unconfirmed guess." 390 Mass., at 569, n. 6, 458 N. E. 2d, at 721, n. 6. But "probable cause does not demand the certainty we associate with formal trials." *Gates*, *supra*, at 246. Lieutenant Beland noted that the caller "admitted that she was the girl I had named, stating that she was surprised that I knew who she was." It is of course possible that the caller merely adopted Lieutenant Beland's suggestion as "a convenient cover for her true identity." 390 Mass., at 570, 458 N. E. 2d, at 722. But given the caller's admission, her obvious knowledge of who Alberico was and how she was connected with Upton, and her explanation of her motive in calling, Lieutenant Beland's inference appears stronger than a mere uninformed and unconfirmed guess. It is enough that the inference was a reasonable one and conformed with the other pieces of evidence making up the total showing of probable cause.

In concluding that there was probable cause for the issuance of this warrant, the Magistrate can hardly be accused of approving a mere "hunch" or a bare recital of legal conclusions. The informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole. Accordingly, we conclude that the information contained in Lieutenant Beland's affidavit provided a sufficient basis for the "practical, common-sense decision" of the Magistrate. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States* v. *Ventresca*, *supra*, at 109.

The judgment of the Supreme Judicial Court of Massachusetts is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN and JUSTICE MARSHALL dissent from the summary disposition of this case and would deny the petition for certiorari.

JUSTICE STEVENS, concurring in the judgment.

In my opinion the judgment of the Supreme Judicial Court of Massachusetts reflects an error of a more fundamental character than the one this Court corrects today. It rested its decision on the Fourth Amendment to the United States Constitution without telling us whether the warrant was valid as a matter of Massachusetts law.[1] It has thereby increased its own burdens as well as ours. For when the case returns to that court, it must then review the probable-cause issue once again and decide whether or not a violation of the state constitutional protection against unreasonable searches and seizures has occurred. If such a violation did take place, much of that court's first opinion and all of this Court's opinion are for naught.[2] If no such violation occurred, the sec-

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[1] Indeed, that court rather pointedly refused to consider whether the search violated the provisions of Art. 14 of the Massachusetts Declaration of Rights. It stated, in part:

"If we have correctly construed the significance of *Illinois* v. *Gates*, the Fourth Amendment standards for determining probable cause to issue a search warrant have not been made so much less clear and so relaxed as to compel us to try our hand at a definition of standards under art. 14. If we have misassessed the consequences of the *Gates* opinion and in fact the *Gates* standard proves to be unacceptably shapeless and permissive, this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by art. 14, and the consequences of the violation of those protections." 390 Mass. 562, 573–574, 458 N. E. 2d 717, 724 (1983).

[2] Cf. *South Dakota* v. *Opperman*, 428 U. S. 364 (1976) (rev'g 89 S. D. 25, 228 N. W. 2d 152), on remand, 247 N. W. 2d 673 (1976) (judgment

ond proceeding in that court could have been avoided by a ruling to that effect when the case was there a year ago.

If the Magistrate had violated a state statute when he issued the warrant, surely the State Supreme Judicial Court would have so held and thereby avoided the necessity of deciding a federal constitutional question. I see no reason why it should not have followed the same sequence of analysis when an arguable violation of the State Constitution is disclosed by the record. As the Oregon Supreme Court has stated:

> "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law." *Sterling* v. *Cupp*, 290 Ore. 611, 614, 625 P. 2d 123, 126 (1981).[3]

The maintenance of the proper balance between the respective jurisdictions of state and federal courts is always a difficult task. In recent years I have been concerned by what I have regarded as an encroachment by this Court into territory that should be reserved for state judges. See, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1065 (1983) (STEVENS, J., dissenting); *South Dakota* v. *Neville*, 459 U. S. 553, 566 (1983) (STEVENS, J., dissenting); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 477–489 (1981) (STEVENS, J., dissenting); *Idaho Department of Employment* v. *Smith*, 434 U. S. 100, 103–105 (1977) (STEVENS, J., dissenting in part). The maintenance of this balance is, however, a two-way

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reinstated on state grounds); *South Dakota* v. *Neville*, 459 U. S. 553 (1983) (rev'g 312 N. W. 2d 723 (1981)), on remand, 346 N. W. 2d 425 (1984) (judgment reinstated in part on state grounds).

[3] See also *State* v. *Kennedy*, 295 Ore. 260, 666 P. 2d 1316 (1983), and cases cited therein, *id.*, at 262, 666 P. 2d, at 1318; *Hewitt* v. *State Accident Ins. Fund Corp.*, 294 Ore. 33, 41–42, 653 P. 2d 970, 975 (1982).

street. It is also important that state judges do not unnecessarily invite this Court to undertake review of state-court judgments. I believe the Supreme Judicial Court of Massachusetts unwisely and unnecessarily invited just such review in this case. Its judgment in this regard reflects a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts.

The absence of a Bill of Rights in the Constitution proposed by the Federal Constitutional Convention of 1787 was a major objection to the Convention's proposal. See, *e. g.*, 12 The Papers of Thomas Jefferson 438 (Boyd ed. 1955). In defense of the Convention's plan Alexander Hamilton argued that the enumeration of certain rights was not only unnecessary, given that such rights had not been surrendered by the people in their grant of limited powers to the Federal Government, but "would even be dangerous" on the ground that enumerating certain rights could provide a "plausible pretense" for the Government to claim powers not granted in derogation of the people's rights. The Federalist No. 84, pp. 573, 574 (Ford ed. 1898) (A. Hamilton). The latter argument troubled the First Congress during deliberations on the Bill of Rights, and its solution became the Ninth Amendment. See 1 Annals of Congress 439 (1789) (remarks of Rep. Madison).

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." To the extent that the Bill of Rights is applicable to the States under the Fourteenth Amendment, the principle embodied in the Ninth Amendment is applicable as well. The Ninth Amendment, it has been said, states but a truism. But that truism goes to the very core of the constitutional relationship between the individual and governmental authority, and, indeed, between sovereigns exercising authority over the individual.

In my view, the court below lost sight of this truism, and permitted the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of

Massachusetts under Art. 14 of the Massachusetts Declaration of Rights. It is of course not my role to state what rights Art. 14 confers upon the people of Massachusetts; under our system of federalism, only Massachusetts can do that. The state court refused to perform that function, however, and instead strained to rest its judgment on federal constitutional grounds.

Whatever protections Art. 14 does confer are surely disparaged when the Supreme Judicial Court of Massachusetts refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States. The rights conferred by Art. 14 may not only exceed the rights conferred by the Fourth Amendment as construed by this Court in *Gates*, but indeed may exceed the rights conferred by the Fourth Amendment as construed by the state court. The dissent followed the approach of the majority to its logical conclusion, stating that there "appears to be no logical basis, and no support in the case law, for interpreting the term 'cause' in art. 14 differently from the 'probable cause' requirement of the Fourth Amendment." 390 Mass. 562, 580, 458 N. E. 2d 717, 727 (1983). "The right question," however, "is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised." Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 179 (1984).

It must be remembered that for the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected

the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people. The Massachusetts court, I believe, ignored this fundamental premise of our constitutional system of government. In doing so, it made an ill-advised entry into the federal domain.

Accordingly, I concur in the Court's judgment.

WELSH *v.* WISCONSIN

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 82–5466. Argued October 5, 1983—Decided May 15, 1984

On the night of April 24, 1978, a witness observed a car that was being driven erratically and that eventually swerved off the road, coming to a stop in a field without causing damage to any person or property. Ignoring the witness' suggestion that he wait for assistance in removing his car, the driver walked away from the scene. The police arrived a few minutes later and were told by the witness that the driver was either very inebriated or very sick. After checking the car's registration, the police, without obtaining a warrant, proceeded to the petitioner's nearby home, arriving at about 9 p. m. They gained entry when petitioner's stepdaughter answered the door, and found petitioner lying naked in bed. Petitioner was then arrested for driving a motor vehicle while under the influence of an intoxicant in violation of a Wisconsin statute which provided that a first offense was a noncriminal violation subject to a civil forfeiture proceeding for a maximum fine of $200. Petitioner was taken to the police station, where he refused to submit to a breath-analysis test. Pursuant to Wisconsin statutes, which subjected an arrestee who refused to take the test to the risk of a 60-day revocation of driving privileges, petitioner requested a court hearing to determine whether his refusal was reasonable. Under Wisconsin law, a refusal to take a breath test was reasonable if the underlying arrest was not lawful. The trial court, ultimately concluding that petitioner's arrest was lawful and that his refusal to take the breath test was therefore unreasonable, issued an order suspending petitioner's license. The Wisconsin Court of Appeals vacated the order, concluding that the warrantless arrest of petitioner in his home violated the Fourth Amendment because the State, although demonstrating probable cause to arrest, had not established the existence of exigent circumstances. The Wisconsin Supreme Court reversed.

Held: The warrantless, nighttime entry of petitioner's home to arrest him for a civil, nonjailable traffic offense, was prohibited by the special protection afforded the individual in his home by the Fourth Amendment. Pp. 748–754.

(a) Before government agents may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. An important factor to be considered when determining

whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. Pp. 748–753.

(b) Petitioner's warrantless arrest in the privacy of his own bedroom for a noncriminal traffic offense cannot be justified on the basis of the "hot pursuit" doctrine, because there was no immediate or continuous pursuit of the petitioner from the scene of a crime, or on the basis of a threat to public safety, because petitioner had already arrived home and had abandoned his car at the scene of the accident. Nor can the arrest be justified as necessary to preserve evidence of petitioner's blood-alcohol level. Even assuming that the underlying facts would support a finding of this exigent circumstance, given the fact that the State had chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment was possible, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. Pp. 753–754.

108 Wis. 2d 319, 321 N. W. 2d 245, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 755. BURGER, C. J., filed a separate statement, *post*, p. 755. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 756.

Gordon Brewster Baldwin argued the cause for petitioner. With him on the briefs was *Archie E. Simonson.*

Stephen W. Kleinmaier, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Bronson C. La Follette*, Attorney General.*

JUSTICE BRENNAN delivered the opinion of the Court.

Payton v. *New York*, 445 U. S. 573 (1980), held that, absent probable cause and exigent circumstances, warrantless arrests in the home are prohibited by the Fourth Amend-

**Charles F. Kahn, Jr.*, filed a brief for the Wisconsin Civil Liberties Union Foundation as *amicus curiae* urging reversal.

ment. But the Court in that case explicitly refused "to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." *Id.*, at 583. Certiorari was granted in this case to decide at least one aspect of the unresolved question: whether, and if so under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense.

I

A

Shortly before 9 o'clock on the rainy night of April 24, 1978, a lone witness, Randy Jablonic, observed a car being driven erratically. After changing speeds and veering from side to side, the car eventually swerved off the road and came to a stop in an open field. No damage to any person or property occurred. Concerned about the driver and fearing that the car would get back on the highway, Jablonic drove his truck up behind the car so as to block it from returning to the road. Another passerby also stopped at the scene, and Jablonic asked her to call the police. Before the police arrived, however, the driver of the car emerged from his vehicle, approached Jablonic's truck, and asked Jablonic for a ride home. Jablonic instead suggested that they wait for assistance in removing or repairing the car. Ignoring Jablonic's suggestion, the driver walked away from the scene.

A few minutes later, the police arrived and questioned Jablonic. He told one officer what he had seen, specifically noting that the driver was either very inebriated or very sick. The officer checked the motor vehicle registration of the abandoned car and learned that it was registered to the petitioner, Edward G. Welsh. In addition, the officer noted that the petitioner's residence was a short distance from the scene, and therefore easily within walking distance.

Without securing any type of warrant, the police proceeded to the petitioner's home, arriving about 9 p. m. When the petitioner's stepdaughter answered the door, the police gained entry into the house.[1] Proceeding upstairs to the petitioner's bedroom, they found him lying naked in bed. At this point, the petitioner was placed under arrest for driving or operating a motor vehicle while under the influence of an intoxicant, in violation of Wis. Stat. § 346.63(1) (1977).[2] The petitioner was taken to the police station, where he refused to submit to a breath-analysis test.

B

As a result of these events, the petitioner was subjected to two separate but related proceedings: one concerning his refusal to submit to a breath test and the other involving the alleged code violation for driving while intoxicated. Under the Wisconsin Vehicle Code in effect in April 1978, one arrested for driving while intoxicated under § 346.63(1) could be requested by a law enforcement officer to provide breath, blood, or urine samples for the purpose of determining the presence or quantity of alcohol. Wis. Stat. § 343.305(1) (1975). If such a request was made, the arrestee was re-

[1] The state trial court never decided whether there was consent to the entry because it deemed decision of that issue unnecessary in light of its finding that exigent circumstances justified the warrantless arrest. After reversing the lower court's finding of exigent circumstances, the Wisconsin Court of Appeals remanded for full consideration of the consent issue. See *State* v. *Welsh*, No. 80–1686 (May 26, 1981), App. 114–125. That remand never occurred, however, because the Supreme Court of Wisconsin reversed the Court of Appeals and reinstated the trial court's judgment. See 108 Wis. 2d 319, 321 N. W. 2d 245 (1982). For purposes of this decision, therefore, we assume that there was no valid consent to enter the petitioner's home.

[2] Since the petitioner's arrest, § 346.63 has been amended to provide that it is a code violation to drive or operate a motor vehicle while under the influence of an intoxicant *or* while evidencing certain blood- or breath-alcohol levels. See Wis. Stat. §§ 346.63(1)(a), (b) (1981–1982). This amendment, however, has no bearing on the issues raised by the present case.

quired to submit to the appropriate testing or risk a revocation of operating privileges. Cf. *South Dakota* v. *Neville*, 459 U. S. 553 (1983) (admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend constitutional right against self-incrimination). The arrestee could challenge the officer's request, however, by refusing to undergo testing and then asking for a hearing to determine whether the refusal was justified. If, after the hearing, it was determined that the refusal was not justified, the arrestee's operating privileges would be revoked for 60 days.[3]

The statute also set forth specific criteria to be applied by a court when determining whether an arrestee's refusal to take a breath test was justified. Included among these criteria was a requirement that, before revoking the arrestee's operating privileges, the court determine that "the refusal . . . to submit to a test was unreasonable." § 343.305(2)(b)(5) (1975). It is not disputed by the parties that an arrestee's refusal to take a breath test would be reasonable, and therefore operating privileges could not be revoked, if the underlying arrest was not lawful. Indeed, state law has consistently provided that a valid arrest is a necessary prerequisite to the imposition of a breath test. See *Scales* v. *State*, 64 Wis. 2d 485, 494, 219 N. W. 2d 286, 292 (1974).[4] Although the stat-

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[3] Since the petitioner's arrest, this statute also has been amended, with the current version found at Wis. Stat. § 343.305 (1981–1982). Although the procedures to be followed by the law enforcement officer and the arrestee have remained essentially unchanged, §§ 343.305(3), (8), the potential length of any revocation of operating privileges has been increased, depending on the arrestee's prior driving record, §§ 343.305(9)(a), (b). An arrestee who improperly refuses to submit to a required test may also be required to comply with an assessment order and a driver safety plan, §§ 343.305(9)(c)–(e). These amendments, however, also have no direct bearing on the issues raised by the present case.

[4] "The implied consent law does not limit the right to take a blood sample as an incident to a *lawful* arrest. *It should be emphasized, however, that the arrest, and therefore probable cause for making it, must precede the taking of the blood sample.* We conclude that the sample was constitu-

ute in effect in April 1978 referred to reasonableness, the current version of § 343.305 explicitly recognizes that one of the issues that an arrestee may raise at a refusal hearing is "whether [he] was lawfully placed under arrest for violation of s. 346.63(1)." §§ 343.305(3)(b)(5)(a), (8)(b) (1981–1982). See also 67 Op. Wis. Atty. Gen. No. 93–78 (1978) ("statutory

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tionally taken incident to the *lawful* arrest." 64 Wis. 2d, at 494, 219 N. W. 2d, at 292 (emphasis added).

Nor is there any doubt that the Supreme Court of Wisconsin applies federal constitutional standards when determining whether an arrest, even for a nonjailable traffic offense, is lawful. The court, for example, explained the basis for its holding in this case as follows:

"The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by [state statute].

"The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution. The [trial court] upheld this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence. . . . [T]he court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding the consensual entry necessitated remanding the case on that issue. We affirm the findings of the [trial court], holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest . . . .

. . . . .

"To prevail in this case, the state must prove the co-existence of probable cause and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circumstances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U. S. Const. amend. IV; Wis. Const. art. I, sec. 11." 108 Wis. 2d, at 320–321, 326–327, 321 N. W. 2d, at 246–247, 249–250 (emphasis added) (citations and footnotes omitted).

scheme . . . contemplates that a lawful arrest be made prior to a request for submission to a test").[5]

Separate statutory provisions control the penalty that might be imposed for the substantive offense of driving while intoxicated. At the time in question, the Vehicle Code provided that a first offense for driving while intoxicated was a noncriminal violation subject to a civil forfeiture proceeding for a maximum fine of $200; a second or subsequent offense in the previous five years was a potential misdemeanor that could be punished by imprisonment for up to one year and a maximum fine of $500. Wis. Stat. § 346.65(2) (1975). Since that time, the State has made only minor amendments to these penalty provisions. Indeed, the statute continues to categorize a first offense as a civil violation that allows for only a monetary forfeiture of no more than $300. § 346.65(2)(a) (Supp. 1983–1984). See *State* v. *Albright*, 98 Wis. 2d 663, 672–673, 298 N. W. 2d 196, 202 (App. 1980).

C

As noted, in this case the petitioner refused to submit to a breath test; he subsequently filed a timely request for a refusal hearing. Before that hearing was held, however, the State filed a criminal complaint against the petitioner for driving while intoxicated.[6] The petitioner responded by

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[5] Because state law provides that evidence of the petitioner's refusal to submit to a breath test is inadmissible if the underlying arrest was unlawful, this case does not implicate the exclusionary rule under the Federal Constitution.

[6] The petitioner was charged with a criminal misdemeanor because this was his second such citation in the previous five years. See § 346.65(2) (1975). Although the petitioner was subject to a criminal charge, the police conducting the warrantless entry of his home did not know that the petitioner had ever been charged with, or much less convicted of, a prior violation for driving while intoxicated. It must be assumed, therefore, that at the time of the arrest the police were acting as if they were investigating and eventually arresting for a nonjailable traffic offense that constituted only a civil violation under the applicable state law. See *Beck* v. *Ohio*, 379 U. S. 89, 91, 96 (1964).

filing a motion to dismiss the complaint, relying on his contention that the underlying arrest was invalid. After receiving evidence at a hearing on this motion in July 1980, the trial court concluded that the criminal complaint would not be dismissed because the existence of both probable cause and exigent circumstances justified the warrantless arrest. The decision at the refusal hearing, which was not held until September 1980, was therefore preordained. In fact, the primary issue at the refusal hearing—whether the petitioner acted reasonably in refusing to submit to a breath test because he was unlawfully placed under arrest, see *supra*, at 744–746—had already been determined two months earlier by the same trial court.

As expected, after the refusal hearing, the trial court concluded that the arrest of the petitioner was lawful and that the petitioner's refusal to take the breath test was therefore unreasonable.[7] Accordingly, the court issued an order suspending the petitioner's operating license for 60 days. On appeal, the suspension order was vacated by the Wisconsin Court of Appeals. See *State* v. *Welsh*, No. 80–1686 (May 26, 1981), App. 114–125. Contrary to the trial court, the appellate court concluded that the warrantless arrest of the petitioner in his home violated the Fourth Amendment because the State, although demonstrating probable cause to arrest, had not established the existence of exigent circumstances. The petitioner's refusal to submit to a breath test was therefore reasonable.[8] The Supreme Court of Wisconsin in turn reversed the Court of Appeals, relying on the existence of

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[7] When ruling from the bench after the refusal hearing, the trial judge specifically indicated:

"[T]he Court is bound by its earlier ruling that that was a valid arrest. And, I think [counsel for the petitioner] certainly will have the right to challenge that on appeal if he appeals this matter, as well as the previous ruling should there be a conviction on the underlying charge." App. 111. See also *id.*, at 112–113.

[8] The court remanded the case for further findings as to whether the police had entered the petitioner's home with consent. See n. 1, *supra*.

three factors that it believed constituted exigent circumstances: the need for "hot pursuit" of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent destruction of evidence. See 108 Wis. 2d 319, 336–338, 321 N. W. 2d 245, 254–255 (1982). Because of the important Fourth Amendment implications of the decision below, we granted certiorari. 459 U. S. 1200 (1983).[9]

II

It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972). And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. See *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948).[10] It is not surprising, therefore,

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[9] Although the state courts differed in their respective conclusions concerning exigent circumstances, they each found that the facts known to the police at the time of the warrantless home entry were sufficient to establish probable cause to arrest. The petitioner has not challenged that finding before this Court.

The parallel criminal proceedings against the petitioner, see *supra*, at 746–747, and n. 6, resulted in a misdemeanor conviction for driving while intoxicated. During the jury trial, held in early 1982, the State introduced evidence of the petitioner's refusal to submit to a breath test. His appeal from that conviction, now before the Wisconsin Court of Appeals, has been stayed pending our decision in this case. See Brief for Petitioner 17, n. 5.

[10] In *Johnson*, Justice Jackson eloquently explained the warrant requirement in the context of a home search:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security

that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U. S., at 586. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–475 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show . . . the presence of 'exigent circumstances'"). See also *Michigan* v. *Clifford*, 464 U. S. 287, 296–297 (1984) (plurality opinion); *Steagald* v. *United States*, 451 U. S. 204, 211–212 (1981); *McDonald* v. *United States*, 335 U. S. 451, 456 (1948); *Johnson* v. *United States*, *supra*, at 13–15; *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

Consistently with these long-recognized principles, the Court decided in *Payton* v. *New York*, *supra*, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. *Id.*, at 583–590. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, *id.*, at 583, thereby leaving to the lower courts the initial application of the exigent-circumstances exception.[11] Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," *United States* v. *United States District Court*, *supra*, at 318, and that the police bear a heavy burden

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and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." 333 U. S., at 13–14 (footnote omitted).

[11] Our decision in *Payton*, allowing warrantless home arrests upon a showing of probable cause and exigent circumstances, was also expressly limited to felony arrests. See, *e. g.*, 445 U. S., at 574, 602. Because we conclude that, in the circumstances presented by this case, there were no exigent circumstances sufficient to justify a warrantless home entry, we have no occasion to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses.

when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see, *e. g.*, *United States* v. *Santana*, 427 U. S. 38, 42–43 (1976) (hot pursuit of a fleeing felon); *Warden* v. *Hayden*, 387 U. S. 294, 298–299 (1967) (same); *Schmerber* v. *California*, 384 U. S. 757, 770–771 (1966) (destruction of evidence); *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see *Santana*, *supra*.

Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. See *Payton* v. *New York*, *supra*, at 586. When the government's interest is only to arrest for a minor offense,[12] that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

This is not a novel idea. Writing in concurrence in *McDonald* v. *United States*, 335 U. S. 451 (1948), Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed:

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[12] Even the dissenters in *Payton*, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests. See *id.*, at 616–617 (WHITE, J., joined by BURGER, C. J., and REHNQUIST, J., dissenting) ("The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes").

"Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. . . . While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." *Id.*, at 459–460 (footnote omitted).

Consistently with this approach, the lower courts have looked to the nature of the underlying offense as an important factor to be considered in the exigent-circumstances calculus. In a leading federal case defining exigent circumstances, for example, the en banc United States Court of Appeals for the District of Columbia Circuit recognized that the gravity of the underlying offense was a principal factor

to be weighed. *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 320, 435 F. 2d 385, 392 (1970).[13] Without approving all of the factors included in the standard adopted by that court, it is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis.

For example, courts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest. Compare *United States* v. *Campbell*, 581 F. 2d 22 (CA2 1978) (allowing warrantless home arrest for armed robbery when exigent circumstances existed), with *Commonwealth* v. *Williams*, 483 Pa. 293, 396 A. 2d 1177 (1978) (disallowing warrantless home arrest for murder due to absence of exigent circumstances). But of those courts addressing the issue, most have refused to permit warrantless home arrests for nonfelonious crimes. See, *e. g.*, *State* v. *Guertin*, 190 Conn. 440, 453, 461 A. 2d 963, 970 (1983) ("The [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded"); *People* v. *Strelow*, 96 Mich. App. 182, 190–193, 292 N. W. 2d 517, 521–522 (1980). See also *People* v. *Sanders*, 59 Ill. App. 3d 6, 374 N. E. 2d 1315 (1978) (burglary without weapons not grave offense of violence for this purpose); *State* v. *Bennett*, 295 N. W. 2d 5 (S. D. 1980) (distribution of controlled substances not a grave offense for these purposes). But cf. *State* v. *Penas*, 200 Neb. 387, 263 N. W. 2d 835 (1978) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence; decided before *Payton*); *State* v. *Niedermeyer*, 48 Ore. App. 665, 617

[13] See generally Donnino & Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Albany L. Rev. 90 (1980); Harbaugh & Faust, "Knock on Any Door"—Home Arrests After *Payton* and *Steagald*, 86 Dick. L. Rev. 191, 220–233 (1982); Note, Exigent Circumstances for Warrantless Home Arrests, 23 Ariz. L. Rev. 1171 (1981).

P. 2d 911 (1980) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence). The approach taken in these cases should not be surprising. Indeed, without necessarily approving any of these particular holdings or considering every possible factual situation, we note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.

We therefore conclude that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on "unreasonable searches and seizures," and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see *Payton*, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Application of this principle to the facts of the present case is relatively straightforward. The petitioner was arrested in the privacy of his own bedroom for a noncriminal, traffic offense. The State attempts to justify the arrest by relying on the hot-pursuit doctrine, on the threat to public safety, and on the need to preserve evidence of the petitioner's blood-alcohol level. On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety. Hence, the only potential emergency claimed by the State was the need to ascertain the petitioner's blood-alcohol level.

Even assuming, however, that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. See Wis. Stat. § 346.65(2) (1975); § 346.65(2)(a) (Supp. 1983–1984); *supra*, at 746. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. See n. 6, *supra*. Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.[14] To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

III

The Supreme Court of Wisconsin let stand a warrantless, nighttime entry into the petitioner's home to arrest him for a civil traffic offense. Such an arrest, however, is clearly prohibited by the special protection afforded the individual in his home by the Fourth Amendment. The petitioner's arrest was therefore invalid, the judgment of the Supreme Court of Wisconsin is vacated, and the case is

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[14] Nor do we mean to suggest that the prevention of drunken driving is not properly of major concern to the States. The State of Wisconsin, however, along with several other States, see, *e. g.*, Minn. Stat. § 169.121 subd. 4 (1982); Neb. Rev. Stat. § 39–669.07(1) (Supp. 1983); S. D. Codified Laws § 32–23–2 (Supp. 1983), has chosen to limit severely the penalties that may be imposed after a first conviction for driving while intoxicated. Given that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.

remanded for further proceedings not inconsistent with this opinion.[15]

It is so ordered.

THE CHIEF JUSTICE would dismiss the writ as having been improvidently granted and defer resolution of the question presented to a more appropriate case.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion but add a personal observation.

I yield to no one in my profound personal concern about the unwillingness of our national consciousness to face up to—and to do something about—the continuing slaughter upon our Nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion. I have spoken in these Reports to this point before. *Perez* v. *Campbell*, 402 U. S. 637, 657, and 672 (1971) (opinion concurring in part and dissenting in part); *Tate* v. *Short*, 401 U. S. 395, 401 (1971) (concurring opinion). See also *South Dakota* v. *Neville*, 459 U. S. 553, 555–559 (1983).

And it is amazing to me that one of our great States—one which, by its highway signs, proclaims to be diligent and emphatic in its prosecution of the drunken driver—still classifies driving while intoxicated as a *civil* violation that allows only a money forfeiture of not more than $300 so long as it is a *first* offense. Wis. Stat. § 346.65(2)(a) (Supp. 1983–1984). The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's act. See *ante*, at 754, n. 14 (citing other statutes). Our personal convenience still weighs heavily in the balance, and the highway deaths and

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[15] On remand, the state courts may consider whether the petitioner's arrest was justified because the police had validly obtained consent to enter his home. See n. 1, *supra*.

injuries continue. But if Wisconsin and other States choose by legislation thus to regulate their penalty structure, there is, unfortunately, nothing in the United States Constitution that says they may not do so.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

At common law, "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *United States* v. *Watson*, 423 U. S. 411, 418 (1976). But the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment, see *Street* v. *Surdyka*, 492 F. 2d 368, 371–372 (CA4 1974); 2 W. LaFave, Search and Seizure § 5.1 (1978), and we have never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence. Thus, "it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states." E. Fisher, Laws of Arrest 130 (1967); see ALI, Model Code of Pre-Arraignment Procedure, Appendix X (1975); 1 C. Alexander, The Law of Arrest 445–447 (1949); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 673, 706 (1924).

Wisconsin is one of the States that have expanded the common-law authority to arrest for nonfelony offenses. Wisconsin Stat. § 345.22 (Supp. 1983–1984) provides that "[a] person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation." Relying on this statutory authority, officers of the Madison Police Department arrested Edward Welsh in a bedroom in his home for violating Wis. Stat. § 346.63(1) (1977), which proscribes the operation of a motor

vehicle while intoxicated. Welsh refused to submit to a breath or blood test, and his operator's license was eventually revoked for 60 days for this reason pursuant to Wis. Stat. § 343.305 (1975).

In the civil license revocation proceeding, Welsh argued that his arrest in his house without a warrant was unconstitutional under the Fourth and Fourteenth Amendments to the Federal Constitution and that his refusal to submit to the test could not be used against him. This contention was not based on the proposition that using the refusal in the revocation proceeding would contravene federal law, but rather rested on the fact that Wis. Stat. § 343.305(2)(b)(5) (1975) had been interpreted to require that an arrest be legal if a refusal to be tested is to be the basis for a license revocation.

On review of the license revocation, the Supreme Court of Wisconsin appears to have recognized that, under the Wisconsin statute, Welsh's license was wrongfully revoked if the officers who arrested him had violated the Federal Constitution. 108 Wis. 2d 319, 321 N. W. 2d 245 (1982). See *Scales* v. *State*, 64 Wis. 2d 485, 494, 219 N. W. 2d 286, 292 (1974). The court acknowledged that "the individual's right to privacy in the home is a fundamental freedom" and made clear that the State bore the burden of establishing exigent circumstances justifying a warrantless in-home arrest. 108 Wis. 2d, at 327, 321 N. W. 2d, at 250. But it discerned a strong state interest in combating driving under the influence of alcohol, *id.*, at 334–335, 321 N. W. 2d, at 253–254, and held that the warrantless arrest was proper because (1) the officers were in hot pursuit of a defendant seeking to avoid a chemical sobriety test; (2) Welsh posed a potential threat to public safety; and (3) "[w]ithout an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of [Welsh's] alleged violation . . . would be destroyed." *Id.*, at 338, 321 N. W. 2d, at 255. For two reasons, I would not overturn the judgment of the Supreme Court of Wisconsin.

First, it is not at all clear to me that the important constitutional question decided today should be resolved in a case such as this. Although Welsh argues vigorously that the State violated his federal constitutional rights, he at no point relied on the exclusionary rule, and he does not contend that the Federal Constitution or federal law provides the remedy he seeks. As a general rule, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956). Because the Court does not purport to hold that federal law requires the conclusion that Welsh's refusal to submit to a sobriety test was reasonable, it is not clear to me how the judgment of the Supreme Court of Wisconsin offends federal law.

It is true that under the Wisconsin statutory scheme, an arrestee's refusal to take a breath or blood test would be reasonable and would not justify revocation of operating privileges if the underlying arrest violated the Fourth Amendment or was otherwise unlawful. What the State has done, however, is to attach consequences to an arrest found unlawful under the Federal Constitution that we have never decided federal law itself would attach. The Court has occasionally taken jurisdiction over cases in which the States have provided remedies for violations of federally defined obligations. *E. g.*, *Moore* v. *Chesapeake & Ohio R. Co.*, 291 U. S. 205 (1934). But it has done so in contexts where state remedies are employed to further federal policies. See Greene, Hybrid State Law in the Federal Courts, 83 Harv. L. Rev. 289, 300 (1969). The Fourth Amendment of course applies to the police conduct at issue here. In providing that a driver may reasonably refuse to submit to a sobriety test if he was unlawfully arrested, Wisconsin's Legislature and courts are pursuing a course that they apparently hope will reduce police illegality and safeguard their citizens' rights. Although the State is entitled to draw this conclusion and to implement it as a matter of state law, I am very doubtful that the policies underlying the Fourth Amendment would

require exclusion of the fruits of an illegal arrest in a civil proceeding to remove from the highways a person who insists on driving while under the influence of alcohol. If that is the case—if it would violate no federal policy to revoke Welsh's license even if his arrest was illegal—there is no satisfactory reason for us to review the Supreme Court of Wisconsin's judgment affirming the revocation, even if that court mistakenly applied the Fourth Amendment. For me, this is ample reason not to disturb the judgment.

In any event, I believe that the state court properly construed the Fourth Amendment. It follows from *Payton* v. *New York*, 445 U. S. 573 (1980), that warrantless nonfelony arrests in the home are prohibited by the Fourth Amendment absent probable cause and exigent circumstances. Although I continue to believe that the Court erred in *Payton* in requiring exigent circumstances to justify warrantless in-home felony arrests, *id.*, at 603 (WHITE, J., dissenting), I do not reject the obvious logical implication of the Court's decision. But I see little to commend an approach that looks to "the nature of the underlying offense as an important factor to be considered in the exigent-circumstances calculus." *Ante*, at 751.

The gravity of the underlying offense is, I concede, a factor to be considered in determining whether the delay that attends the warrant-issuance process will endanger officers or other persons. The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately. But if, under all the circumstances of a particular case, an officer has probable cause to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer or other persons or will result in the suspect's escape, I perceive no reason to disregard those exigencies on the ground that the offense for which the suspect is sought is a "minor" one.

As a practical matter, I suspect, the Court's holding is likely to have a greater impact in cases where the officer acted without a warrant to prevent the imminent destruction or removal of evidence. If the evidence the destruction or removal of which is threatened documents only the suspect's participation in a "minor" crime, the Court apparently would preclude a finding that exigent circumstances justified the warrantless arrest. I do not understand why this should be so.

A warrantless home entry to arrest is no more intrusive when the crime is "minor" than when the suspect is sought in connection with a serious felony. The variable factor, if there is one, is the governmental interest that will be served by the warrantless entry. Wisconsin's Legislature and its Supreme Court have both concluded that warrantless in-home arrests under circumstances like those present here promote valid and substantial state interests. In determining whether the challenged governmental conduct was reasonable, we are not bound by these determinations. But nothing in our previous decisions suggests that the fact that a State has defined an offense as a misdemeanor for a variety of social, cultural, and political reasons necessarily requires the conclusion that warrantless in-home arrests designed to prevent the imminent destruction or removal of evidence of that offense are always impermissible. If anything, the Court's prior decisions support the opposite conclusion. See *Camara* v. *Municipal Court*, 387 U. S. 523, 539–540 (1967); *McDonald* v. *United States*, 335 U. S. 451, 454–455 (1948). See also *State* v. *Penas*, 200 Neb. 387, 263 N. W. 2d 835 (1978); *State* v. *Niedermeyer*, 48 Ore. App. 665, 617 P. 2d 911 (1980), cert. denied, 450 U. S. 1042 (1981).

A test under which the existence of exigent circumstances turns on the perceived gravity of the crime would significantly hamper law enforcement and burden courts with pointless litigation concerning the nature and gradation of various crimes. The Court relies heavily on Justice Jack-

son's concurring opinion in *McDonald* v. *United States*, *supra*, which, in minimizing the gravity of the felony at issue there, illustrates that the need for an evaluation of the seriousness of particular crimes could not be confined to offenses defined by statute as misdemeanors. To the extent that the Court implies that the seriousness of a particular felony is a factor to be considered in deciding whether the need to preserve evidence of that felony constitutes an exigent circumstance justifying a warrantless in-home arrest, I think that its approach is misguided. The decision to arrest without a warrant typically is made in the field under less-than-optimal circumstances; officers have neither the time nor the competence to determine whether a particular offense for which warrantless arrests have been authorized by statute is serious enough to justify a warrantless home entry to prevent the imminent destruction or removal of evidence.

This problem could be lessened by creating a bright-line distinction between felonies and other crimes, but the Court—wisely in my view—does not adopt such an approach. There may have been a time when the line between misdemeanors and felonies marked off those offenses involving a sufficiently serious threat to society to justify warrantless in-home arrests under exigent circumstances. But the category of misdemeanors today includes enough serious offenses to call into question the desirability of such line drawing. See ALI, Model Code of Pre-Arraignment Procedures 131–132 (Prelim. Draft No. 1, 1965) (discussing ultimately rejected provision abandoning "in-presence" requirement for misdemeanor arrests). If I am correct in asserting that a bright-line distinction between felonies and misdemeanors is untenable and that the need to prevent the imminent destruction or removal of evidence of some nonfelony crimes can constitute an exigency justifying warrantless in-home arrests under certain circumstances, the Court's approach will necessitate a case-by-case evaluation of the seriousness of

particular crimes, a difficult task for which officers and courts are poorly equipped.

Even if the Court were correct in concluding that the gravity of the offense is an important factor to consider in determining whether a warrantless in-home arrest is justified by exigent circumstances, it has erred in assessing the seriousness of the civil-forfeiture offense for which the officers thought they were arresting Welsh. As the Court observes, the statutory scheme in force at the time of Welsh's arrest provided that the first offense for driving under the influence of alcohol involved no potential incarceration. Wis. Stat. § 346.65(2) (1975). Nevertheless, this Court has long recognized the compelling state interest in highway safety, *South Dakota* v. *Neville*, 459 U. S. 553, 558–559 (1983), the Supreme Court of Wisconsin identified a number of factors suggesting a substantial and growing governmental interest in apprehending and convicting intoxicated drivers and in deterring alcohol-related offenses, 108 Wis. 2d, at 334–335, 321 N. W. 2d, at 253–254, and recent actions of the Wisconsin Legislature evince its "belief that significant benefits, in the reduction of the costs attributable to drunk driving, may be achieved by the increased apprehension and conviction of even first time . . . offenders." Note, 1983 Wis. L. Rev. 1023, 1053.

The Court ignores these factors and looks solely to the penalties imposed on first offenders in determining whether the State's interest is sufficient to justify warrantless in-home arrests under exigent circumstances. *Ante*, at 754. Although the seriousness of the prescribed sanctions is a valuable objective indication of the general normative judgment of the seriousness of the offense, *Baldwin* v. *New York*, 399 U. S. 66, 68 (1970) (plurality opinion), other evidence is available and should not be ignored. *United States* v. *Craner*, 652 F. 2d 23, 24–27 (CA9 1981); *United States* v. *Woods*, 450 F. Supp. 1335, 1340 (Md. 1978); *Brady* v. *Blair*, 427 F. Supp. 5, 9 (SD Ohio 1976). Although first offenders are subjected

only to civil forfeiture under the Wisconsin statute, the seriousness with which the State regards the crime for which Welsh was arrested is evinced by (1) the fact that defendants charged with driving under the influence are guaranteed the right to a jury trial, Wis. Stat. § 345.43 (1981–1982); (2) the legislative authorization of warrantless arrests for traffic offenses occurring outside the officer's presence, Wis. Stat. § 345.22 (1981–1982); and (3) the collateral consequence of mandatory license revocation that attaches to all convictions for driving under the influence, Wis. Stat. § 343.30(1q) (1981–1982). See also *District of Columbia* v. *Colts*, 282 U. S. 63 (1930); *United States* v. *Craner*, *supra*. It is possible, moreover, that the legislature consciously chose to limit the penalties imposed on first offenders in order to increase the ease of conviction and the overall deterrent effect of the enforcement effort. See Comment, 35 Me. L. Rev. 385, 395, n. 35, 399–400, 403 (1983).

In short, the fact that Wisconsin has chosen to punish the first offense for driving under the influence with a fine rather than a prison term does not demand the conclusion that the State's interest in punishing first offenders is insufficiently substantial to justify warrantless in-home arrests under exigent circumstances. As the Supreme Court of Wisconsin observed, "[t]his is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation." 108 Wis. 2d, at 338, 321 N. W. 2d, at 255. We have previously recognized that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber* v. *California*, 384 U. S. 757, 770 (1966). Moreover, a suspect could cast substantial doubt on the validity of a blood or breath test by consuming additional alcohol upon arriving at his home. In light of the promptness with which the officers reached Welsh's house, therefore, I would hold that the need to prevent the imminent and ongoing destruction of evidence of a serious

violation of Wisconsin's traffic laws provided an exigent circumstance justifying the warrantless in-home arrest. See also, *e. g.*, *People* v. *Ritchie*, 130 Cal. App. 3d 455, 181 Cal. Rptr. 773 (1982); *People* v. *Smith*, 175 Colo. 212, 486 P. 2d 8 (1971); *State* v. *Findlay*, 259 Iowa 733, 145 N. W. 2d 650 (1966); *State* v. *Amaniera*, 132 N. J. Super. 597, 334 A. 2d 398 (1974); *State* v. *Osburn*, 13 Ore. App. 92, 508 P. 2d 837 (1973).

I respectfully dissent.

Syllabus

ESCONDIDO MUTUAL WATER CO. ET AL. *v.* LA JOLLA BAND OF MISSION INDIANS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–2056. Argued March 26, 1984—Decided May 15, 1984

Section 4(e) of the Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (Commission) to issue licenses for the construction, operation, and maintenance of hydroelectric project works located on the public lands and reservations of the United States, including lands held in trust for Indians. The section contains a proviso that such licenses shall be issued "within any reservation" only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired, and "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." Section 8 of the Mission Indian Relief Act of 1891 (MIRA), pursuant to which six reservations were established for respondent Indian Bands (respondents), provides that any United States citizen, firm, or corporation may contract with the Bands for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through their reservations, which contract shall not be valid unless approved by the Secretary of the Interior (Secretary) under such conditions as he may see fit to impose. When the original license covering hydroelectric facilities located on or near the six reservations, including a canal that crosses respondent La Jolla, Rincon, and San Pasqual Bands' reservations, was about to expire, petitioner Escondido Mutual Water Co. (Mutual) and petitioner city of Escondido filed an application with the Commission for a new license. Thereafter the Secretary requested that the Commission recommend federal takeover of the project, and respondents applied for a nonpower license. After hearings on the competing applications, an Administrative Law Judge concluded that the project was not subject to the Commission's licensing jurisdiction. The Commission reversed and granted a license to Mutual, Escondido, and petitioner Vista Irrigation District, which had been using the canal in question. The Court of Appeals in turn reversed the Commission, holding, contrary to the Commission, (1) that § 4(e) of the FPA required the Commission to accept without modification any license conditions recommended by the Secretary; (2) that the Commission was required to satisfy its § 4(e) obligations with respect to all six of the res-

ervations and not just the three through which the canal passes; and (3) that § 8 of the MIRA required the licensees to obtain right-of-way permits from respondent La Jolla, Rincon, and San Pasqual Bands before using the license facilities located on their reservations.

Held:

1. The plain command of § 4(e) of the FPA requires the Commission to accept without modification conditions that the Secretary deems necessary for the adequate protection and utilization of the reservations. Nothing in the legislative history or statutory scheme is inconsistent with this plain command. Pp. 772–779.

2. But the Commission must make its "no inconsistency or interference" findings and include the Secretary's conditions in the license only with respect to projects located "within" the geographical boundaries of a federal reservation. It is clear that Congress concluded that reservations were not entitled to the protection of § 4(e)'s proviso unless some of the licensed works were actually within the reservation. Thus, the Court of Appeals erred in holding that the Commission's § 4(e) obligation to accept the Secretary's conditions and to make such findings applied to the three reservations on which no licensed facilities were located. Pp. 780–784.

3. Section 8 of the MIRA does not require licensees to obtain respondents' consent before they operate licensed facilities located on reservation lands. While § 8 gave respondents authority to determine whether to grant rights-of-way for water projects, that authority did not include the power to override Congress' subsequent decision in enacting the FPA that all lands, including tribal land, could, upon compliance with the FPA, be utilized to facilitate licensed hydroelectric projects. Pp. 784–787.

692 F. 2d 1223 and 701 F. 2d 826, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

Paul D. Engstrand argued the cause for petitioners. With him on the brief were *Donald R. Lincoln, Leroy A. Wright, John R. Schell, Kent H. Foster,* and *C. Emerson Duncan II.*

Jerome M. Feit argued the cause for respondent Federal Energy Regulatory Commission urging reversal. With him on the briefs were *Stephen R. Melton, Arlene Pianko Groner,* and *Kristina Nygaard.*

Elliott Schulder argued the cause for respondent Secretary of the Interior. With him on the brief were *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne, Dirk D. Snel,*

and *James C. Kilbourne*. *Robert S. Pelcyger* argued the cause for respondents La Jolla Band of Mission Indians et al. With him on the brief were *Scott B. McElroy*, *Jeanne S. Whiteing*, and *Arthur J. Gajarsa*.*

JUSTICE WHITE delivered the opinion of the Court.

Section 4(e) of the Federal Power Act (FPA), 41 Stat. 1066, as amended, 16 U. S. C. § 797(e), authorizes the Federal Energy Regulatory Commission (Commission)[1] to issue licenses for the construction, operation and maintenance of hydroelectric project works located on the public lands and reservations of the United States, including lands held in trust for Indians. The conditions upon which such licenses may issue are contained in § 4(e) and other provisions of the FPA. The present case involves a dispute among the Commission, the Secretary of the Interior (Secretary), and several Bands of the Mission Indians over the role each is to play in determining what conditions an applicant must meet in order to obtain a license to utilize hydroelectric facilities located on or near six Mission Indian Reservations.

I

The San Luis Rey River originates near the Palomar Mountains in northern San Diego County, Cal. In its natural condition, it flows through the reservations of the La

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*Briefs of *amici curiae* urging reversal were filed for the American Public Power Association et al. by *Robert L. McCarty*, *George H. Williams, Jr.*, *Donald H. Hamburg*, *Christopher D. Williams*, *Frances E. Francis*, and *Robert C. McDiarmid*; for the Edison Electric Institute by *William J. Madden, Jr.*, *Frederick T. Searls*, *Peter B. Kelsey*, and *William L. Fang*; and for the Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project, Montana, by *Frank J. Martin, Jr.*, and *John D. Sharer*.

Patrick A. Parenteau filed a brief for the National Wildlife Federation et al. as *amici curiae*.

[1] The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter. See 42 U. S. C. §§ 7172(a), 7295(b).

Jolla, Rincon, and Pala Bands of Mission Indians. The reservations of the Pauma, Yuima,[2] and three-quarters of the reservation of the San Pasqual Bands of Mission Indians are within the river's watershed. These six Indian reservations were permanently established pursuant to the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 712.

Since 1895, petitioner Escondido Mutual Water Co. (Mutual) and its predecessor in interest have diverted water out of the San Luis Rey River for municipal uses in and around the cities of Vista and Escondido. The point of diversion is located within the La Jolla Reservation, upstream from the other reservations. Mutual conveys the water from the diversion point to Lake Wohlford, an artificial storage facility, by means of the Escondido canal, which crosses parts of the La Jolla, Rincon, and San Pasqual Reservations.[3]

In 1915, Mutual constructed the Bear Valley powerhouse downstream from Lake Wohlford. Neither Lake Wohlford nor the Bear Valley plant is located on a reservation. In 1916, Mutual completed construction of the Rincon powerhouse, which is located on the Rincon Reservation. Both of these powerhouses generate electricity by utilizing waters diverted from the river through the canal.

Following the enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (codified as Part I of the FPA,

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[2] The Yuima tracts of land are under the jurisdiction of the Pauma Band. Thus, while there are six Mission Indian Reservations involved in the present dispute, only five Indian Bands are represented.

[3] Various agreements, dating back to 1894, among the Secretary, the Bands whose land the canal traverses, and Mutual and its predecessor purportedly grant Mutual rights-of-way for the canal in exchange for supplying certain amounts of water to the Bands. The validity of these agreements is the subject of separate, pending litigation instituted by the Bands in 1969. *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, Nos. 69–217S, 72–276–S, and 72–271–S (SD Cal.).

In addition, the Bands have sued the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.* (1976 ed.), for failure to protect their water rights. *Long* v. *United States*, No. 80–A1 (Cl. Ct.). That proceeding is also pending.

16 U. S. C. § 791a *et seq.*), Mutual applied to the Commission for a license covering its two hydroelectric facilities. In 1924, the Commission issued a 50-year license covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses.

The present dispute began when the 1924 license was about to expire. In 1971, Mutual and the city of Escondido filed an application with the Commission for a new license. In 1972, the Secretary requested that the Commission recommend federal takeover of the project after the original license expired.[4] Later that year, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to § 15(b) of the FPA,[5] applied for a nonpower license under the supervision of Interior, to take effect when the original license expired. The Pauma and Pala Bands eventually joined in this application.

After lengthy hearings on the competing applications,[6] an Administrative Law Judge concluded that the project was not subject to the Commission's licensing jurisdiction because

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[4] Section 14(b), 16 U. S. C. § 807(b), of the FPA authorizes the Commission to recommend to Congress that the Federal Government take over a project following expiration of the license. If Congress enacts legislation to that effect, the project is operated by the Government upon payment to the original licensee of its net investment in the project and certain severance damages.

[5] Section 15(b), 16 U. S. C. § 808(b), authorizes the Commission to grant a license for use of a project as a "nonpower" facility if it finds the project no longer is adapted to power production. In that event, the new licensee must make the same payments to the original licensee that are required of the United States pursuant to § 14(b). See n. 4, *supra*.

[6] Earlier, the Secretary and the La Jolla, Rincon, and San Pasqual Bands filed complaints with the Commission, alleging that Mutual violated the provisions of the 1924 license by permitting the Vista Irrigation District to use the project facilities and by using the canal to divert water pumped from a lake created by Vista nine miles above Mutual's diversion dam. They sought, among other things, an increase in the annual charges paid to the Bands under the license. These complaints were considered in conjunction with the competing applications, and the Commission awarded readjusted annual charges to the three Bands. The Commission's resolution of that issue is not before us.

the power aspects of the project were insignificant in comparison to the project's primary purpose—conveying water for domestic and irrigation consumption. 6 FERC ¶63,008 (1977).[7] The Commission, however, reversed that decision and granted a new 30-year license to Mutual, Escondido, and the Vista Irrigation District, which had been using the canal for some time to convey water pumped from Lake Henshaw, a lake located some nine miles above Mutual's diversion dam. 6 FERC ¶61,189 (1979).

In its licensing decision, the Commission made three rulings that are the focal point of this case. First, the Commission ruled that § 4(e) of the FPA did not require it to accept without modification conditions which the Secretary deemed necessary for the adequate protection and utilization of the reservations.[8] Accordingly, despite the Secretary's insistence, the Commission refused to prohibit the licensees from interfering with the Bands' use of a specified quantity of water, *id.*, at 61,415, and n. 146, or to require that water pumped from a particular groundwater basin[9] not be transported through the licensed facilities without the written consent of the five Bands, *id.*, at 61,145, and n. 147. Other conditions proposed by the Secretary were similarly rejected or modified. See *id.*, at 61,414–61,417. Second,

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[7] The Bear Valley powerhouse has a generating capacity of only 520 kilowatts. The Rincon powerhouse is capable of producing only 240 kilowatts. The Administrative Law Judge noted that "[t]he horsepower generated by the entire project is not even the equivalent to that produced by a half dozen modern automobiles." 6 FERC, at 65,093.

[8] The Commission concluded that § 4(e) required it "to give great weight to the judgments and proposals of the Secretaries of the Interior and Agriculture" but that under § 10(a) it retained ultimate authority for determining "the extent to which such conditions will in fact be included in particular licenses." 6 FERC, at 61,414.

[9] Groundwater is water beneath the surface of the earth. The condition suggested by the Secretary applied to water which Vista pumped from the Warner groundwater basin underlying Lake Henshaw and its headwaters in order to augment the natural flows into the lake.

although it imposed some conditions on the licensees in order to "preclude any possible interference or inconsistency of the power license . . . with the purpose for which the La Jolla, Rincon, and San Pasqual reservations were created,"[10] *id.*, at 61,424–61,425, the Commission refused to impose similar conditions for the benefit of the Pala, Pauma, and Yuima Reservations, ruling that its § 4(e) obligation in that respect applies only to reservations that are physically occupied by project facilities. Finally, the Commission rejected the arguments of the Bands and the Secretary that a variety of statutes, including § 8 of the MIRA, required the licensees to obtain the "consent" of the Bands before the license could issue.

On appeal, the Court of Appeals for the Ninth Circuit reversed each of these three rulings. *Escondido Mutual Water Co.* v. *FERC*, 692 F. 2d 1223, amended, 701 F. 2d 826 (1983). The court held that § 4(e) requires the Commission to accept without modification any license conditions recommended by the Secretary, subject to subsequent judicial review of the propriety of the conditions, that the Commission is required to satisfy its § 4(e) obligations with respect to all six of the reservations affected by the project and not just the three through which the canal passes, and that § 8 of the MIRA requires the licensees to obtain right-of-way permits from the La Jolla, Rincon, and San Pasqual Bands before using the licensed facilities located on the reservations.[11]

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[10] For example, the Commission required the licensees to permit the three Bands to use certain quantities of water under certain circumstances. See *id.*, at 61,424–61,432.

[11] Judge Anderson dissented from the order entered on petition for rehearing, 701 F. 2d, at 827–831, concluding that neither § 8 of the MIRA nor § 16 of the Indian Reorganization Act, 25 U. S. C. § 476, requires that tribal consent be obtained before the Bands' lands can be used for a hydroelectric project licensed under the FPA. He also concluded that the Secretary's § 4(e) conditions have to be included in the license only to the extent they are reasonable and that the reasonableness determination is to be made initially by the Commission.

Mutual, Escondido, and Vista filed the present petition for certiorari, which we granted, 464 U. S. 913 (1983), challenging all three of the Court of Appeals' rulings.[12] We address each in turn.

II

Section 4(e) provides that licenses issued under that section "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 U. S. C. § 797(e). The mandatory nature of the language chosen by Congress appears to require that the Commission include the Secretary's conditions in the license even if it disagrees with them. Nonetheless, petitioners[13] argue that an examination of the statutory scheme and legislative history of the Act shows that Congress could not have meant what it said. We disagree.

We first note the difficult nature of the task facing petitioners. Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" *North Dakota* v. *United States*, 460 U. S. 300, 312 (1983) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980)). Congress' apparent desire that the Secretary's conditions "shall" be included in the license must therefore be given effect unless there are clear expressions of legislative intent to the contrary.

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[12] The Court of Appeals affirmed the Commission's conclusion that it had jurisdiction over the project, and the parties have not sought review of that ruling.

[13] The Commission did not petition for review of the Court of Appeals' decision but filed a brief and appeared at oral argument urging reversal. Since the Commission's arguments largely parallel those presented by Mutual, Escondido, and Vista, our use of the term petitioners includes the Commission.

Petitioners initially focus on the purpose of the legislation that became the relevant portion of the FPA. In 1920, Congress passed the Federal Water Power Act in order to eliminate the inefficiency and confusion caused by the "piecemeal, restrictive, negative approach" to licensing prevailing under prior law. *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152, 180 (1946). See H. R. Rep. No. 61, 66th Cong., 1st Sess., 4–5 (1919). Prior to passage of the Act, the Secretaries of the Interior, War, and Agriculture each had authority to issue licenses for hydroelectric projects on lands under his respective jurisdiction. The Act centralized that authority by creating a Commission, consisting of the three Secretaries,[14] vested with exclusive authority to issue licenses. Petitioners contend that Congress could not have intended to empower the Secretary to require that conditions be included in the license over the objection of the Commission because that would frustrate the purpose of centralizing licensing procedures.

Congress was no doubt interested in centralizing federal licensing authority into one agency, but it is clear that it did not intend to relieve the Secretaries of all responsibility for ensuring that reservations under their respective supervision were adequately protected. In a memorandum explaining the administration bill, the relevant portion of which was enacted without substantive change,[15] O. C. Merrill, one of the chief draftsmen of the Act and later the first Commission Secretary, explained that creation of the Commission "will

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[14] In 1930, the Commission was reorganized as a five-person body, independent from the Secretaries. Act of June 23, 1930, ch. 572, 46 Stat. 797.

[15] Between 1914 and 1917, four bills dealing with the licensing of hydroelectric projects were introduced into Congress, none successfully. In 1918, a bill prepared by the Secretaries of War, the Interior, and Agriculture, at the direction of President Wilson, was introduced. H. R. 8716, 65th Cong., 2d Sess. (1918). It contained the language of the § 4(e) proviso basically as it is now framed. Because of the press of World War I and other concerns, the legislation was not enacted until 1920. See J. Kerwin, Federal Water-Power Legislation 217–263 (1926).

not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers." Memorandum on Water Power Legislation from O. C. Merrill, Chief Engineer, Forest Service, dated October 31, 1917, App. 371. With regard to what became § 4(e), he wrote:

> "4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.
>
> "This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction." *Id.*, at 373–374.

Similarly, during hearings on the bill, Secretary of Agriculture Houston explained that the Grand Canyon did not need to be exempted from the licensing provisions, stating:

> "I can see no special reason why the matter might not be handled safely under the provisions of the proposed measure, which requires that developments on Government reservations may not proceed except with the approval of the three heads of departments—the commission—*with such safeguards as the head of the department immediately charged with the reservation may deem wise.*" Water Power: Hearings before the House Committee on Water Power, 65th Cong., 2d Sess., 677 (1918) (emphasis added).

The Members of Congress understood that under the Act the Secretary of the Interior had authority with respect to licenses issued on Indian reservations over and above that

possessed by the other Commission members. Senator Walsh of Montana, a supporter of the Act, explained:

> "[W]hen an application is made for a license to construct a dam within an Indian reservation, the matter goes before the commission, which consists of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. They all agree that it is in the public interest that the license should be granted, or a majority of them so agree. *Furthermore, the head of the department must agree; that is to say, the Secretary of the Interior in the case of an Indian reservation must agree that the license shall be issued.*" 59 Cong. Rec. 1564 (1920) (emphasis added).

It is thus clear enough that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions. The legislative history concerning § 4(e) plainly supports the conclusion that Congress meant what it said when it stated that the license "shall . . . contain such conditions as the Secretary . . . shall deem necessary for the adequate protection and utilization of such reservations."[16]

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[16] Petitioners note that in 1930, when the structure of the Commission was changed, see n. 14, *supra*, James Lawson, then Acting Chief Counsel of the Commission, stated that under the structure then in existence, "[t]he Commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation." Investigation of Federal Regulation of Power: Hearings pursuant to S. Res. 80 and S. 3619 before the Senate Committee on Interstate Commerce, 71st Cong., 2d Sess., 358 (1930). This snippet of postenactment history does not help petitioners' cause at all. All parties agree that the Commission has the authority to make a finding that "the license will not interfere *or be inconsistent* with the purpose for which such reservation was created or acquired." 16 U. S. C. § 797(e) (emphasis added). This is separate from

Petitioners next argue that a literal reading of the conditioning proviso of § 4(e) cannot be squared with other portions of the statutory scheme. In particular, they note that the same proviso that grants the Secretary the authority to qualify the license with the conditions he deems necessary also provides that the Commission must determine that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U. S. C. § 797(e). Requiring the Commission to include the Secretary's conditions in the license over its objection, petitioners maintain, is inconsistent with granting the Commission the power to determine that no interference or inconsistency will result from issuance of the license because it will allow the Secretary to "veto" the decision reached by the Commission. Congress could not have intended to "'paralyze with one hand what it sought to promote with the other,'" *American Paper Institute, Inc.* v. *American*

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the Secretary's authority to condition the license for the adequate protection and utilization of the reservation. Lawson's statement was clearly concerned with the former. Indeed, a contemporaneous memorandum by the Commission's legal staff (of which Lawson was the head), stated that the Secretary of the Interior had authority under what is now § 4(e) "'to prescribe conditions to be inserted in the license for the protection and utilization of the reservation.'" Brief for Secretary of the Interior 33, quoting Memorandum of Sept. 20, 1929, p. 23. It may well be that in a particular case the conditions suggested by the Secretary will unduly undermine the Commission's licensing judgment. However, as noted *infra*, at 777, and n. 19, that is a determination the court of appeals is to make.

Similarly misplaced is petitioners' reliance on the fact that once the bill was passed, President Wilson, at the request of the Secretary, withheld his signature until Congress agreed that it would pass legislation in its next session removing national parks and monuments from the scope of the Act. Contrary to petitioners' assertion, this does not show that the Secretary knew that § 4(e) did not grant him enough authority to protect these lands, which were within his "conditioning" jurisdiction. Rather, the Secretary objected to the inclusion of national parks and monuments in the legislation because he believed that Congress, not the Commission, should decide on a case-by-case basis whether any hydroelectric development should occur in these areas. H. R. Rep. No. 1299, 66th Cong., 3d Sess., 2 (1921).

Electric Power Service Corp., 461 U. S. 402, 421 (1983) (quoting *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U. S. 480, 489 (1947)), petitioners contend.

This argument is unpersuasive because it assumes the very question to be decided. All parties agree that there are limits on the types of conditions that the Secretary can require to be included in the license:[17] the Secretary has no power to veto the Commission's decision to issue a license and hence the conditions he insists upon must be reasonably related to the protection of the reservation and its people.[18] The real question is whether the Commission is empowered to decide when the Secretary's conditions exceed the permissible limits. Petitioners' argument assumes that the Commission has the authority to make that decision. However, the statutory language and legislative history conclusively indicate that it does not; the Commission "shall" include in the license the conditions the Secretary deems necessary. It is then up to the courts of appeals to determine whether the conditions are valid.[19]

Petitioners contend that such a scheme of review is inconsistent with traditional principles of judicial review of administrative action. If the Commission is required to include the conditions in the license even though it does not agree with them, petitioners argue, the courts of appeals will not be

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[17] Even the Secretary concedes that the conditions must be "reasonable and supported by evidence in the record." Brief for Secretary of the Interior 37. See also Tr. of Oral Arg. 20.

[18] By its terms, § 4(e) requires that the conditions must be "necessary for the adequate protection and utilization of such reservations." At oral argument, the Secretary agreed that the conditions should ultimately be sustained only if they "are reasonably related to the purpose of ensuring that the purposes of the reservation are adequately protected, and that the reservation is adequately utilized." *Id.*, at 22.

[19] Section 313(b) of the FPA provides that the Commission's orders, including licenses, can be reviewed "in the United States court of appeals for any circuit wherein the licensee . . . is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." 16 U. S. C. § 825*l*(b).

in a position to grant deference to the Commission's findings and conclusions because those findings and conclusions will not be included in the license. However, that is apparently exactly what Congress intended. If the Secretary concludes that the conditions are necessary to protect the reservation, the Commission is required to adopt them as its own, and the court is obligated to sustain them if they are reasonably related to that goal, otherwise consistent with the FPA, and supported by substantial evidence.[20] The fact that in reality it is the Secretary's, and not the Commission's, judgment to which the court is giving deference is not surprising since the statute directs the Secretary, and not the Commission, to decide what conditions are necessary for the adequate protection of the reservation.[21] There is nothing in the statute

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[20] Of course, the Commission is not required to argue in support of the conditions if it objects to them. Indeed, it is free to express its disagreement with them, not only in connection with the issuance of the license but also on review. Similarly, the Commission can refuse to issue a license if it concludes that, as conditioned, the license should not issue. In either event, the license applicant can seek review of the conditions in the court of appeals, but the court is to sustain the conditions if they are consistent with law and supported by the evidence presented to the Commission, either by the Secretary or other interested parties. 16 U. S. C. § 825*l*(b).

We note that in the unlikely event that none of the parties to the licensing proceeding seeks review, the conditions will go into effect notwithstanding the Commission's objection to them since the Commission is not authorized to seek review of its own decisions. The possibility that this might occur does not, however, dissuade us from interpreting the statute in accordance with its plain meaning. Congress apparently decided that if no party was interested in the differences between the Commission and the Secretary, the dispute would best be resolved in a nonjudicial forum.

[21] Petitioners also contend that the Secretary's authority to impose conditions on the license is inconsistent with the Commission's authority and responsibility under § 10(a) to determine that "the project adopted . . . will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial public uses." 16 U. S. C. § 803(a). Our discussion of the alleged conflict between the Commission's authority to make its "no interference or inconsistency" determination and the Secretary's conditioning authority applies with equal force to this contention. The ultimate decision whether to issue

or the review scheme to indicate that Congress wanted the Commission to second-guess the Secretary on this matter.[22]

In short, nothing in the legislative history or statutory scheme is inconsistent with the plain command of the statute that licenses issued within a reservation by the Commission pursuant to § 4(e) "shall be subject to and contain such conditions as the Secretary . . . shall deem necessary for the adequate protection and utilization of such reservations." Since the Commission failed to comply with this statutory command when it issued the license in this case, the Court of Appeals correctly reversed its decision in this respect.[23]

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the license belongs to the Commission, but the Secretary's proposed conditions must be included if the license issues. Any conflict between the Commission and the Secretary with respect to whether the conditions are consistent with the statute must be resolved initially by the courts of appeals, not the Commission.

Petitioners' assertion that the conditions proposed by the Secretary in this case were outside the Commission's authority to adopt goes to the validity of the conditions, an issue not before this Court. It may well be that the conditions imposed by the Secretary are inconsistent with the provisions of the FPA and that they are therefore invalid (something we do not decide), but that issue is not for the Commission to decide in the first instance but is reserved for the court of appeals at the instance of the licensees and with the participation of the Commission if it is inclined to present its views.

[22] Petitioners also contend that the Commission's longstanding interpretation of § 4(e) is entitled to deference, citing language from its early decisions. *E. g., Pigeon River Lumber Co.*, 1 F. P. C. 206, 209 (1935); *Southern California Edison Co.*, 8 F. P. C. 364, 386 (1949). Petitioners concede, however, that the Commission never actually rejected any of the Secretary's conditions until 1975. *Pacific Gas & Electric Co.*, 53 F. P. C. 523, 526 (1975). Even then, the issue was not squarely presented because there was some question whether § 4(e) even applied in that proceeding. *Ibid.* It is therefore far from clear that the Commission's interpretation is a longstanding one. More importantly, an agency's interpretation, even if well established, cannot be sustained if, as in this case, it conflicts with the clear language and legislative history of the statute.

[23] Mutual, Escondido, and Vista assert that § 4(e) is not at issue in this case because this is a relicensing procedure governed by § 15(a). The Commission was of a different view and dealt with the case as an original

III

The Court of Appeals also concluded that the Commission's § 4(e) obligations to accept the Secretary's proposed conditions and to make findings as to whether the license is consistent with the reservation's purpose applied to the Pala, Yuima, and Pauma Reservations even though no licensed facilities were located on these reservations. Petitioners contend that this conclusion is erroneous. We agree.

Again, the statutory language is informative and largely dispositive. Section 4(e) authorizes the Commission:

> "To issue licenses . . . for the purpose of constructing . . . dams . . . or other project works . . . upon any part of the public lands and reservations of the United States . . . *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations . . . ."

If a project is licensed "within" any reservation, the Commission must make a "no interference or inconsistency" finding with respect to "such" reservation, and the Secretary may impose conditions for the protection of "such" reservation. Nothing in the section requires the Commission to

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licensing procedure since the new license included facilities not covered by the 1924 license and since the project being relicensed was "so materially different from the [p]roject . . . which was initially licensed in 1924 that little more than the project number remains the same." 6 FERC ¶ 61,189, p. 61,411 (1979). The licensees did not object to this conclusion in their petition for rehearing to the Commission, and they may not challenge it now. 16 U. S. C. § 825*l*(b). Accordingly, we have no reason to decide whether § 4(e) applies to relicensing proceedings.

make findings about, or the Secretary to impose conditions to protect, any reservation other than the one within which project works are located. The section imposes no obligation on the Commission or power on the Secretary with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works.

The Court of Appeals, however, purported to discover an ambiguity in the term "within." Positing that the term "reservations" includes not only tribal lands but also tribal water rights, the Court of Appeals reasoned that since a project could not be "within" a water right, the term must have a meaning other than its literal one. This effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive.

There is no doubt that "reservations" include "interests in lands owned by the United States"[24] and that for many purposes water rights are considered to be interests in lands. See 1 R. Clark, Waters and Water Rights § 53.1 p. 345 (1967). But it does not follow that Congress intended the "reservations" spoken of in § 4(e) to include water rights.[25] The section deals with project works to be located "upon" and "within" a reservation. As the Court of Appeals itself indicated, the section does tend to "paint a geographical picture in the mind of the reader," 692 F. 2d, at 1236, and we find the

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[24] Section 3(2) of the FPA provides:

"'[R]eservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws . . . ." 16 U. S. C. § 796(2).

[25] Indeed, in another provision of the Act, Congress provided that the term "project" includes "all water-rights . . . lands, or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance" of a "unit of improvement or development." 16 U. S. C. § 796(11). Had Congress thought that water rights were always covered by the term "interests in land," it would not have felt it necessary to refer to water rights.

Court of Appeals' and respondents' construction of the section to be quite untenable. Congress intended the obligation of the Commission and the conditioning power of the Secretary to apply only with respect to the specific reservation upon which any project works were to be located and not to other reservations that might be affected by the project.

The Court of Appeals sought to bolster its conclusion by noting that a literal reading of the term "within" would leave a gap in the protection afforded the Bands by the FPA because "a project may turn a potentially useful reservation into a barren waste without ever crossing it in the geographical sense—e. g., by diverting the waters which would otherwise flow through or percolate under it." *Ibid.* This is an unlikely event, for in this respect the Bands are adequately protected by other provisions of the statutory scheme. First, the Bands cannot be deprived of any water to which they have a legal right. The Commission is expressly forbidden to adjudicate water rights, 16 U. S. C. § 821, and the license applicant must submit satisfactory evidence that he has obtained sufficient water rights to operate the project authorized in the license, 16 U. S. C. § 802(b). Second, if the Bands are using water, the rights to which are owned by the license applicant, the Commission is empowered to require that the license applicant continue to let the Bands use this water as a condition of the license if the Commission determines that the Bands' use of the water constitutes an overriding beneficial public use. 16 U. S. C. § 803(a). See *California* v. *FPC*, 345 F. 2d 917, 923–924 (CA9), cert. denied, 382 U. S. 941 (1965). The Bands' interest in the continued use of the water will accordingly be adequately protected without requiring the Commission to comply with § 4(e) every time one of the reservations might be affected by a proposed project.

Respondents additionally contend that under other provisions of the FPA the § 4(e) proviso at issue applies any time a reservation is "affected" by a licensed project even if none of

the licensed facilities is actually located on the reservation. They rely in particular on § 23(b), which provides that project works can be constructed without a license on nonnavigable waters over which Congress has jurisdiction under its Commerce Clause powers only if, among other things,[26] "no public lands or reservations are affected." 16 U. S. C. § 817. Respondents argue that it would make no sense to conclude that Congress intended to require the Commission to exercise its licensing jurisdiction when a reservation is "affected" by such a project if it did not also intend to afford those reservations all of the protections outlined in § 4(e). However, that is exactly the conclusion that the language of § 4(e) compels, and, contrary to respondents' argument, there is nothing illogical about such a scheme.

Under § 4(e), the Commission is authorized to license projects in two general types of situations—when the project is located on waters (navigable or nonnavigable) over which Congress has jurisdiction under the Commerce Clause and when the project is located upon any public lands or reservations. It is clear that the Commission's obligations to make a "no inconsistency or no interference" determination and to include the Secretary's conditions in the license apply only in the latter situation—when the license is issued "within any reservation." The fact that a person is required to obtain a license in the former situation any time a project on nonnavigable waters affects a reservation indicates only that Congress concluded that in such circumstances the possible disruptive effects of such a project were so great that the Commission should regulate the project through its licensing powers. That is not, as respondents seem to imply, a meaningless gesture if all of the provisions of § 4(e) do not apply.

[26] The statute authorizes the construction of project works without a license on nonnavigable waters over which Congress has Commerce Clause jurisdiction if the Commission finds that "the interests of interstate or foreign commerce would [not] be affected by such proposed construction . . . and if no public lands or reservations are affected." 16 U. S. C. § 817.

Even if the Commission is not required to comply with all of the requirements of § 4(e) when it issues such a license, it is still required to shape the license so that the project is best adapted, among other things, for the improvement and utilization of water-power development and for "other beneficial public uses, including recreational purposes." 16 U. S. C. § 803(a). In complying with that duty, the Commission is clearly entitled to consider how the project will affect any federal reservations and to require the licensee to structure the project so as to avoid any undue injury to those reservations. See *Udall* v. *FPC*, 387 U. S. 428, 450 (1967). As noted *supra*, at 782, the Commission can even require that, as a condition of the license, the licensee surrender some of its water rights in order to protect such reservations if the Commission determines that such action would be in the public interest. However, it is clear that Congress concluded that reservations were not entitled to the added protection provided by the proviso of § 4(e) unless some of the licensed works were actually within the reservation.

The scheme crafted by Congress in this respect is sufficiently clear to require us to hold that the Commission must make its "no inconsistency or interference" determination and include the Secretary's conditions in the license only with respect to projects located "within" the geographical boundaries of a federal reservation.

IV

The final issue presented for review is whether § 8 of the MIRA requires licensees to obtain the consent of the Bands before they operate licensed facilities located on reservation lands. Section 8 provides in relevant part:

> "Subsequent to the issuance of any tribal patent,[27] or of any individual trust patent . . ., any citizen of the United States, firm, or corporation may contract with the tribe,

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[27] Trust patents were issued on September 13, 1892, for the La Jolla and Rincon Reservations, and on July 10, 1910, for the San Pasqual Reservation.

band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose." 26 Stat. 714.

The Court of Appeals concluded that this provision, which by its terms authorizes private parties to enter into a contract with the Bands, precludes the Commission from licensing those parts of the project that occupy reservation land without the consent of the Indians. When the legislative histories of § 8 and of the FPA are considered, however, the Court of Appeals' interpretation cannot stand.

Section 8 appeared in the MIRA just prior to its passage. Several irrigation companies were seeking rights-of-way across the reservations. The Secretary had concluded that irrigation ditches and flumes would benefit both the settlers and the Indians. H. R. Rep. No. 3282, 50th Cong., 1st Sess., 3–4 (1888). Two Attorneys General, however, had ruled that only Congress could authorize the alienation of Indian lands. *Lemhi Indian Reservation*, 18 Op. Atty. Gen. 563 (1887); *Dam at Lake Winnibigoshish*, 16 Op. Atty. Gen. 552 (1880). In light of these opinions, the Secretary prepared an amendment to the bill, authorizing the Bands to contract for the sale of rights-of-way, subject to Interior's approval. H. R. Rep. No. 3282, *supra*, at 2. Section 8 was therefore designed to authorize the Indians and the Secretary to grant rights-of-way to third parties; it was not intended to act as a limit on the sovereign authority of the Federal Government to acquire or grant rights-of-way over public lands and reservations.

In essence, § 8 increased the Bands' authority over its land so that they had almost the same rights as other private landowners.[28] The Bands were authorized to negotiate with any

[28] The Bands' situation was somewhat different since it was necessary to secure the approval of the Secretary for any such contracts.

private party wishing to acquire rights-of-way and to enter into any agreement with those parties, something they were previously unable to do. And, until some overriding authority was invoked, the Bands, like private landowners, had complete discretion whether to grant rights-of-way for hydroelectric project facilities. However, there is no indication that once Congress exercised its sovereign authority to use the land for such purposes the Bands were to have more power to stop such action than would a private landowner in the same situation—both are required to permit such use upon payment of just compensation.[29] Therefore, the only question is whether Congress decided to exercise that authority with respect to Indian lands when it enacted the FPA. The answer to that inquiry was clearly articulated in a somewhat different context more than 20 years ago.

> "The Federal Power Act constitutes a complete and comprehensive plan . . . for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—'tribal lands embraced within Indian reservations.' See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 118 (1960).

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[29] The FPA requires that when licenses involve tribal lands within a reservation, "the Commission shall . . . fix a reasonable annual charge for the use thereof." 16 U. S. C. § 803(e). When a licensed facility is on private land, the licensee must acquire the appropriate right-of-way from the landowner either by private negotiation or through eminent domain. 16 U. S. C. § 814.

It is equally clear that, when enacting the FPA, Congress did not intend to give Indians some sort of special authority to prevent the Commission from exercising the licensing authority it was receiving from Congress. Indeed, Congress squarely considered and rejected such a proposal. During the course of the debate concerning the legislation, the Senate amended the bill to require tribal consent for some projects. Section 4(e) of the Senate version of the bill provided that "in respect to tribal lands embraced within Indian reservations, which said lands were ceded to Indians by the United States by treaty, no license shall be issued except by and with the consent of the council of the tribe." 59 Cong. Rec. 1534 (1920). However, that amendment was stricken from the bill by the Conference, the conferees stating that they "saw no reason why waterpower use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." H. R. Conf. Rep. No. 910, 66th Cong., 2d Sess., 8 (1920).

In short, while § 8 of the MIRA gave the Bands extensive authority to determine whether to grant rights-of-way for water projects, that authority did not include the power to override Congress' subsequent decision that all lands, including tribal lands, could, upon compliance with the provisions of the FPA, be utilized to facilitate licensed hydroelectric projects. Under the FPA, the Secretary, with the duty to safeguard reservations, may condition, but may not veto, the issuance of a license for project works on an Indian reservation. We cannot believe that Congress nevertheless intended to leave a veto power with the concerned tribe or tribes. The Commission need not, therefore, seek the Bands' permission before it exercises its licensing authority with respect to their lands.[30]

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[30] The Bands suggest that even in the absence of § 8 of the MIRA, their consent would be necessary before the license could issue because of their sovereign power to prevent the use of their lands without their consent. Brief for Respondents La Jolla Band of Mission Indians et al. 37–39. However, it is highly questionable whether the Bands have inherent authority

V

The Court of Appeals correctly determined that the Commission was required to include in the license any conditions which the Secretary of the Interior deems necessary for the protection and utilization of the three reservations in which project works are located. It was in error, however, in concluding that the Commission was required to fulfill this and its other § 4(e) obligations with respect to the other three reservations affected by the project and that § 8 of the MIRA empowered the Bands to prevent the licensing of facilities on their lands. The court's judgment is affirmed in part and reversed in part, and the case is remanded to the court for further proceedings consistent with this opinion.

It is so ordered.

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to prevent a federal agency from carrying out its statutory responsibility since such authority would seem to be inconsistent with their status. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 208–209 (1978). In any event, it is clear that all aspects of Indian sovereignty are subject to defeasance by Congress, *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978), and, from the legislative history of the FPA, *supra*, at 787, that Congress intended to permit the Commission to issue licenses without the consent of the tribes involved.

Syllabus

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES ET AL. *v.* TAXPAYERS FOR VINCENT ET AL.

APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-975. Argued October 12, 1983—Decided May 15, 1984

Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property. Appellee Taxpayers for Vincent, a group of supporters of a candidate for election to the Los Angeles City Council, entered into a contract with appellee Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs with the candidate's name on them. COGS produced cardboard signs and attached them to utility pole crosswires at various locations. Acting under § 28.04, city employees routinely removed all posters (including the COGS signs) attached to utility poles and similar objects covered by the ordinance. Appellees then filed suit in Federal District Court against appellants, the city and various city officials (hereafter City), alleging that § 28.04 abridged appellees' freedom of speech within the meaning of the First Amendment, and seeking damages and injunctive relief. The District Court entered findings of fact, concluded that § 28.04 was constitutional, and granted the City's motion for summary judgment. The Court of Appeals reversed, reasoning that the ordinance was presumptively unconstitutional because significant First Amendment interests were involved, and that the City had not justified its total ban on all signs on the basis of its asserted interests in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property.

Held:

1. The "overbreadth" doctrine is not applicable here. There is nothing in the record to indicate that § 28.04 will have any different impact on any third parties' interests in free speech than it has on appellees' interests, and appellees have failed to identify any significant difference between their claim that § 28.04 is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their signs during a political campaign. Thus, it is inappropriate to entertain an overbreadth challenge to § 28.04. Pp. 796–803.

2. Section 28.04 is not unconstitutional as applied to appellees' expressive activity. Pp. 803–817.

(a) The general principle that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas

at the expense of others is not applicable here. Section 28.04's text is neutral—indeed it is silent—concerning any speaker's point of view, and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner. It is within the City's constitutional power to attempt to improve its appearance, and this interest is basically unrelated to the suppression of ideas. Cf. *United States* v. *O'Brien*, 391 U. S. 367, 377. Pp. 803–805.

(b) Municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression. The problem addressed by § 28.04—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490. Pp. 805–807.

(c) Section 28.04 curtails no more speech than is necessary to accomplish its purpose of eliminating visual clutter. By banning posted signs, the City did no more than eliminate the exact source of the evil it sought to remedy. The rationale of *Schneider* v. *State*, 308 U. S. 147, which held that ordinances that absolutely prohibited handbilling on public streets and sidewalks were invalid, is inapposite in the context of the instant case. Pp. 808–810.

(d) The validity of the City's esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment, and there is no predicate in the District Court's findings for the conclusion that the prohibition against the posting of appellees' signs fails to advance the City's esthetic interest. Pp. 810–812.

(e) While a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate, § 28.04 does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. The District Court's findings indicate that there are ample alternative modes of communication in Los Angeles. P. 812.

(f) There is no merit in appellees' suggestion that the property covered by § 28.04 either is itself a "public forum" subject to special First Amendment protection, or at least should be treated in the same respect as the "public forum" in which the property is located. The mere fact that government property can be used as a vehicle for communication—such as the use of lampposts as signposts—does not mean that the Constitution requires such use to be permitted. Public property which is not by tradition or designation a forum for public communication may be reserved by the government for its intended purposes, communicative or otherwise, if the regulation on speech (as here) is reasonable and not an

effort to suppress expression merely because public officials oppose the speaker's view. Pp. 813–815.

(g) Although plausible policy arguments might well be made in support of appellees' suggestion that the City could have written an ordinance that would have had a less severe effect on expressive activity like theirs—such as by providing an exception for political campaign signs—it does not follow that such an exception is constitutionally mandated, nor is it clear that some of the suggested exceptions would even be constitutionally permissible. To create an exception for appellees' political speech and not other types of protected speech might create a risk of engaging in constitutionally forbidden content discrimination. The City may properly decide that the esthetic interest in avoiding visual clutter justifies a removal of all signs creating or increasing that clutter. Pp. 815–817.

682 F. 2d 847, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 818.

Anthony Saul Alperin argued the cause for appellants. With him on the briefs were *Ira Reiner* and *Gary R. Netzer*.

Wayne S. Canterbury argued the cause and filed a brief for appellees.*

JUSTICE STEVENS delivered the opinion of the Court.

Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property.[1] The question pre-

*Briefs of *amici curiae* urging reversal were filed for the City of Antioch by *William R. Galstan;* and for the National Institute of Municipal Law Officers by *J. Lamar Shelley, John W. Witt, Henry W. Underhill, Jr., Benjamin L. Brown, Roy D. Bates, James B. Brennan, Roger F. Cutler, Clifford D. Pierce, Jr., Walter M. Powell, Frederick A. O. Schwarz, Jr., William H. Taube, William I. Thornton, Jr., Max P. Zall,* and *Charles S. Rhyne.*

A brief of *amici curiae* urging affirmance was filed by *Alan L. Schlosser, Amitai Schwartz, Fred Okrand,* and *Neil H. O'Donnell* for the American Civil Liberties Union et al.

[1] The ordinance reads as follows:

"Sec. 28.04. Hand-bills, signs-public places and objects:

"(a) No person shall paint, mark or write on, or post or otherwise affix, any hand-bill or sign to or upon any sidewalk, crosswalk, curb, curbstone,

sented is whether that prohibition abridges appellees' freedom of speech within the meaning of the First Amendment.[2]

In March 1979, Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters known as Taxpayers for Vincent (Taxpayers) entered into a contract with a political sign service company known as Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs with Vincent's name on them. COGS produced 15- by 44-inch cardboard signs and attached them to utility poles at various locations by draping them over crosswires

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street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign.

"(b) Nothing in this section contained shall apply to the installation of terrazzo sidewalks or sidewalks of similar construction, sidewalks permanently colored by an admixture in the material of which the same are constructed, and for which the Board of Public Works has granted a written permit.

"(c) Any hand-bill or sign found posted, or otherwise affixed upon any public property contrary to the provisions of this section may be removed by the Police Department or the Department of Public Works. The person responsible for any such illegal posting shall be liable for the cost incurred in the removal thereof and the Department of Public Works is authorized to effect the collection of said cost.

"(d) Nothing in this section shall apply to the installation of a metal plaque or plate or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality for which the Board of Public Works, with the approval of the Council, has granted a written permit.

"(e) Nothing in this section shall apply to the painting of house numbers upon curbs done under permits issued by the Board of Public Works under and in accordance with the provisions of Section 62.96 of this Code."

[2] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Under the Fourteenth Amendment, city ordinances are within the scope of this limitation on governmental authority. *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

which support the poles and stapling the cardboard together at the bottom. The signs' message was: "Roland Vincent—City Council."

Acting under the authority of § 28.04 of the Municipal Code, employees of the city's Bureau of Street Maintenance routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the COGS signs. The weekly sign removal report covering the period March 1–March 7, 1979, indicated that among the 1,207 signs removed from public property during that week, 48 were identified as "Roland Vincent" signs. Most of the other signs identified in that report were apparently commercial in character.[3]

On March 12, 1979, Taxpayers and COGS filed this action in the United States District Court for the Central District of California, naming the city, the Director of the Bureau of Street Maintenance, and members of the City Council as defendants.[4] They sought an injunction against enforcement of the ordinance as well as compensatory and punitive damages. After engaging in discovery, the parties filed cross-motions for summary judgment on the issue of liability. The District Court entered findings of fact, concluded that the ordinance was constitutional, and granted the City's motion.

The District Court's findings do not purport to resolve any disputed issue of fact; instead, they summarize material in the record that appears to be uncontroverted. The findings recite that the principal responsibility for locating and remov-

[3] The first 10 signs identified on the March 9 weekly report were:

"Leonard's Nite Club	11	Raul Palomo, Jr.	12
Alamar Travel Bureau Inc.	5	Roland Vincent	48
The Item—Madam Wongs	13	The American Club	2
Salon Broadway	14	Rose Royce	11
Vernon Auditorium—Apache Jupiter	20	Total Experience	13"

App. 73.

[4] For convenience we shall refer to these parties as simply as the "City."

ing signs and handbills posted in violation of § 28.04 is assigned to the Street Use Inspection Division of the city's Bureau of Street Maintenance. The court found that both political and nonpolitical signs are illegally posted and that they are removed "without regard to their content."[5]

After explaining the purposes for which the City's zoning code had been enacted, and noting that the prohibition in § 28.04 furthered those purposes, the District Court found that the large number of illegally posted signs "constitute a clutter and visual blight."[6] With specific reference to the posting of the COGS signs on utility pole crosswires, the District Court found that such posting "would add somewhat to the blight and inevitably would encourage greatly increased posting in other unauthorized and unsightly places . . . ."[7]

In addition, the District Court found that placing signs on utility poles creates a potential safety hazard, and that other violations of § 28.04 "block views and otherwise cause traffic hazards."[8] Finally, the District Court concluded that the sign prohibition does not prevent taxpayers or COGS "from

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[5] App. to Juris. Statement 17a.

[6] *Id.*, at 18a.

"The Los Angeles Planning and Zoning Code was enacted in part to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; to prevent and fight fire; to lessen congestion on streets; to facilitate adequate provisions for community utilities and facilities and to promote health, safety, and the general welfare, all in accordance with a comprehensive plan." Finding 11, App. to Juris. Statement 17a.

[7] App. to Juris. Statement 18a. The District Court's Finding 14 reads, in full, as follows:

"The large number of signs illegally posted on the items of public and utility property enumerated in Section 28.04 constitute a clutter and visual blight. The posting of signs on utility pole cross wires for which the plaintiffs [seek] authorization would add somewhat to the blight and inevitably would encourage greatly increased posting in other unauthorized and unsightly places by people not aware of the distinction the plaintiffs seek to make."

[8] Finding 17, App. to Juris. Statement 18a.

exercising their free speech rights on the public streets and in other public places; they remain free to picket and parade, to distribute handbills, to carry signs and to post their signs and handbills on their automobiles and on private property with the permission of the owners thereof."[9]

In its conclusions of law the District Court characterized the esthetic and economic interests in improving the beauty of the City "by eliminating clutter and visual blight" as "legitimate and compelling."[10] Those interests, together with the interest in protecting the safety of workmen who must scale utility poles and the interest in eliminating traffic hazards, adequately supported the sign prohibition as a reasonable regulation affecting the time, place, and manner of expression.

The Court of Appeals did not question any of the District Court's findings of fact, but it rejected some of its conclusions of law. The Court of Appeals reasoned that the ordinance was presumptively unconstitutional because significant First Amendment interests were involved. It noted that the City had advanced three separate justifications for the ordinance, but concluded that none of them was sufficient. The Court of Appeals held that the City had failed to make a sufficient showing that its asserted interests in esthetics and preventing visual clutter were substantial because it had not offered to demonstrate that the City was engaged in a comprehensive effort to remove other contributions to an unattractive environment in commercial and industrial areas. The City's interest in minimizing traffic hazards was rejected because it was readily apparent that no substantial traffic problems would result from permitting the posting of certain kinds of signs on many of the publicly owned objects covered by the ordinance. Finally, while acknowledging that a flat prohibition against signs on certain objects such as fire hydrants and traffic signals would be a permissible method of prevent-

[9] Finding 18, App. to Juris. Statement 18a.

[10] Conclusion of Law No. 5, App. to Juris. Statement 19a.

ing interference with the intended use of public property, and that regulation of the size, design, and construction of posters, or of the method of removing them, might be reasonable, the Court of Appeals concluded that the City had not justified its total ban.[11]

In its appeal to this Court the City challenges the Court of Appeals' holding that § 28.04 is unconstitutional on its face. Taxpayers and COGS defend that holding and also contend that the ordinance is unconstitutional as applied to their posting of political campaign signs on the crosswires of utility poles. There are two quite different ways in which a statute or ordinance may be considered invalid "on its face"—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad." We shall analyze the "facial" challenges to the ordinance, and then address its specific application to appellees.

I

The seminal cases in which the Court held state legislation unconstitutional "on its face" did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg* v. *California*, 283 U. S. 359 (1931),[12] and *Lovell* v. *Griffin*, 303 U. S.

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[11] Nevertheless, the court acknowledged that should subsequent experience with a less comprehensive prohibition prove ineffective in achieving the City's goals, it might reenact the very ordinance the court had just struck down. As authority for this procedure, the court cited Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1110–1111 (1968).

[12] The question before the Court was whether Stromberg could constitutionally be convicted for displaying a red flag as a symbol of opposition to organized government. Stromberg was a supervisor at a summer camp for children. The camp's curriculum stressed class consciousness and the solidarity of workers. Each morning at the camp a red flag was raised and the children recited a pledge of allegiance to the "workers' flag." The stat-

444 (1938),[13] the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas.[14] In cases of this character a holding of facial invalidity expresses the conclusion that the statute

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ute under which Stromberg was convicted prohibited peaceful display of a symbol of opposition to organized government. The Court wrote:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The . . . statute being invalid upon its face, the conviction of the appellant . . . must be set aside." 283 U. S., at 369–370.

[13] Lovell was convicted of distributing religious pamphlets without a license. A local ordinance required a license to distribute any literature, and gave the chief of police the power to deny a license in order to abate anything he considered to be a "nuisance." The Court wrote:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." 303 U. S., at 451–452 (footnote omitted).

[14] In *Stromberg*, the only justification for the statute was the suppression of ideas. In *Lovell*, since no attempt was made to tailor the licensing requirement to a substantive evil unrelated to the suppression of ideas, the statute created an unacceptable risk that it would be used to suppress. Under such statutes, *any* enforcement carries with it the risk that the enforcement is being used merely to suppress speech, since the statute is not aimed at a substantive evil within the power of the government to prohibit.

could never be applied in a valid manner. Such holdings[15] invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court.

Subsequently, however, the Court did recognize an exception to this general rule for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties. This "overbreadth" doctrine has its source in *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). In that case the Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected.[16] The Court

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[15] Subsequent cases have continued to employ facial invalidation where it was found that every application of the statute created an impermissible risk of suppression of ideas. See *Saia* v. *New York*, 334 U. S. 558 (1948) (ordinance prohibited use of loudspeaker in public places without permission of the chief of police whose discretion was unlimited); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (ordinance required license to distribute religious literature without standards for the exercising of licensing discretion); *Schneider* v. *State*, 308 U. S. 147 (1939) (ordinances prohibited distributing leaflets without a license and provided no standards for issuance of licenses); *Hague* v. *CIO*, 307 U. S. 496, 516 (1939) (plurality opinion) (statute permitted city to deny permit for a public demonstration subject only to the uncontrolled discretion of the director of public safety).

[16] "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefor call into question the whole scheme of licensing when he is prosecuted for failure to procure it. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." 310 U. S., at 97–98 (citation omitted).

has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it.[17] This exception from the general rule is predicated on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).

In the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. In order to decide whether the overbreadth exception is applicable in a particular case, we have weighed the likelihood that the statute's very existence will inhibit free expression.

> "[T]here comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a

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[17] A representative statement of the doctrine is found in *Gooding* v. *Wilson*, 405 U. S. 518 (1972).

"At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' *Dombrowski* v. *Pfister*, 380 U. S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,' *id.*, at 486. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Id.*, at 520–521 (citations omitted).

See also, *e. g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, 494 (1965).

statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U. S., at 615 (citation omitted).[18]

The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.[19] On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself—the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court.

> "The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation,

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[18] See also *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973).

[19] "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." *Broadrick*, 413 U. S., at 630 (BRENNAN, J., dissenting).

"Simply put, the doctrine asserts that an overbroad regulation of speech or publication may be subject to facial review and invalidation, even though its application in the instant case is constitutionally unobjectionable. Thus, a person whose activity could validly be suppressed under a more narrowly drawn law is allowed to challenge an overbroad law because of its application to others. The bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches *substantially* beyond the permissible scope of legislative regulation. Thus, the issue under the overbreadth doctrine is whether a government restriction of speech that is arguably valid as applied to the case at hand should nevertheless be invalidated to avoid the substantial prospect of unconstitutional application elsewhere." Jeffries, Rethinking Prior Restraint, 92 Yale L. J. 409, 425 (1983) (emphasis supplied).

However, where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 217 (1975).

> has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *New York* v. *Ferber*, 458 U. S. 747, 772 (1982) (footnote omitted).

In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds. See *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 216 (1975). See also *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462, n. 20 (1978); *Parker* v. *Levy*, 417 U. S. 733, 760–761 (1974).

The Court of Appeals concluded that the ordinance was vulnerable to an overbreadth challenge because it was an "overinclusive" response to traffic concerns and not the "least drastic means" of preventing interference with the normal use of public property. This conclusion rested on an evaluation of the assumed effect of the ordinance on third parties, rather than on any specific consideration of the impact of the ordinance on the parties before the court. This is not, however, an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on Taxpayers and COGS.

Taxpayers and COGS apparently would agree that the prohibition against posting signs on most of the publicly owned objects mentioned in the ordinance is perfectly reasonable. Thus, they do not dispute the City's power to proscribe the attachment of any handbill or sign to any sidewalk, crosswalk, curb, lamppost, hydrant, or lifesaving equipment.[20] Their

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[20] Brief for Appellees 22, n. 16. In his affidavit in support of the motion for partial summary judgment, the president of COGS stated:

"No COGS signs are posted on sidewalk surfaces, streetlamp posts, hydrants, trees, shrubs, treestacks or guards, vertical utility poles, fire alarm or police telegraph systems, drinking fountains, lifebuoys, life preservers, lifesaving equipment or street or traffic signs."

position with respect to utility poles is not entirely clear, but they do contend that it is unconstitutional to prohibit the attachment of their cardboard signs to the horizontal crosswires supporting utility poles during a political campaign. They have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their political signs. Specifically, Taxpayers and COGS have not attempted to demonstrate that the ordinance applies to any conduct more likely to be protected by the First Amendment than their own crosswire signs. Indeed, the record suggests that many of the signs posted in violation of the ordinance are posted in such a way that they may create safety or traffic problems that COGS has tried to avoid. Accordingly, on this record it appears that if the ordinance may be validly applied to COGS, it can be validly applied to most if not all of the signs of parties not before the Court. Appellees have simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court. It would therefore be inappropriate in this case to entertain an overbreadth challenge to the ordinance.

Taxpayers and COGS do argue generally that the City's interest in eliminating visual blight is not sufficiently weighty to justify an abridgment of speech. If that were the only interest the ordinance advanced, then this argument would be analogous to the facial challenges involved in cases like *Stromberg* and *Lovell*. But as previously observed, appellees acknowledge that the ordinance serves safety interests in many of its applications, and hence do not argue that the ordinance can never be validly applied. Instead, appellees argue that they have placed their signs in locations where only the esthetic interest is implicated. In addition, they argue that they have developed an expertise in not "placing signs in offensive manners which will alienate its own clien-

tele or their constituencies,"[21] and emphasize the special value of free communication during political campaigns, see *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 555 (1981) (STEVENS, J., dissenting in part); *id.*, at 550 (REHNQUIST, J., dissenting). In light of these arguments, appellees' attack on the ordinance is basically a challenge to the ordinance as applied to their activities. We therefore limit our analysis of the constitutionality of the ordinance to the concrete case before us, and now turn to the arguments that it is invalid as applied to the expressive activity of Taxpayers and COGS.[22]

II

The ordinance prohibits appellees from communicating with the public in a certain manner, and presumably diminishes the total quantity of their communication in the City.[23] The application of the ordinance to appellees' expressive activities surely raises the question whether the ordinance abridges their "freedom of speech" within the meaning of the First Amendment, and appellees certainly have standing to challenge the application of the ordinance to their own expressive activities. "But to say the ordinance presents a

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[21] See App. 148.

[22] The fact that the ordinance is capable of valid applications does not necessarily mean that it is valid as applied to these litigants. We may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity. *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 844 (1978). See also *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U. S. 87, 95–98 (1983); *In re Primus*, 436 U. S. 412, 433–438 (1978); *Buckley* v. *Valeo*, 424 U. S. 1, 45–48, 68–74 (1976) *(per curiam)*; *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 100–101 (1972); *Stanley* v. *Georgia*, 394 U. S. 557, 566–567 (1969); *United States* v. *Robel*, 389 U. S. 258, 264, 267 (1967); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222–223 (1967); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462–465 (1958).

[23] Although Taxpayers would presumably devote the resources now expended on posting political signs on public property to other forms of communication if they complied with the ordinance, we shall assume that the ordinance diminishes the total quantity of their speech.

First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *Metromedia, Inc.* v. *San Diego*, 453 U. S., at 561 (BURGER, C. J., dissenting). It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

As *Stromberg* and *Lovell* demonstrate, there are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65, 72 (1983); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 535–536 (1980); *Carey* v. *Brown*, 447 U. S. 455, 462–463 (1980); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63–65, 67–68 (1976) (plurality opinion); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972).

That general rule has no application to this case. For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral—indeed it is silent—concerning any speaker's point of view, and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner.

In *United States* v. *O'Brien*, 391 U. S. 367 (1968), the Court set forth the appropriate framework for reviewing a viewpoint-neutral regulation of this kind:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

It is well settled that the state may legitimately exercise its police powers to advance esthetic values. Thus, in *Berman* v. *Parker*, 348 U. S. 26, 32–33 (1954), in referring to the power of the legislature to remove blighted housing, this Court observed that such housing may be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn." *Ibid.* We concluded: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.*, at 33 (citation omitted). See also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 129 (1978); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9 (1974); *Euclid* v. *Ambler Co.*, 272 U. S. 365, 387–388 (1926); *Welch* v. *Swasey*, 214 U. S. 91, 108 (1909).

In this case, taxpayers and COGS do not dispute that it is within the constitutional power of the City to attempt to improve its appearance, or that this interest is basically unrelated to the suppression of ideas. Therefore the critical inquiries are whether that interest is sufficiently substantial to justify the effect of the ordinance on appellees' expression, and whether that effect is no greater than necessary to accomplish the City's purpose.

III

In *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance.

In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held that the State had a substantial interest in protecting its citizens from unwelcome noise.[24] In *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), the Court upheld the city's prohibition of political advertising on its buses, stating that the city was entitled to protect unwilling viewers against intrusive advertising that may interfere with the city's goal of making its buses "rapid, convenient, pleasant, and inexpensive," *id.*, at 302–303 (plurality opinion). See also *id.*, at 307 (Douglas, J., concurring in judgment); *Erznoznik* v. *City of Jacksonville*, 422 U. S., at 209, and n. 5. These cases indicate that the municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

Metromedia, Inc. v. *San Diego*, *supra*, dealt with San Diego's prohibition of certain forms of outdoor billboards. There the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded

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[24] Justice Reed wrote:

"The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.

"City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets." 336 U.S., at 86–87 (plurality opinion).

A majority of the Court agreed with this analysis. See *id.*, at 96–97 (Frankfurter, J., concurring); *id.*, at 97–98 (Jackson, J., concurring).

that this interest was sufficient to justify a prohibition of billboards, see *id.*, at 507–508, 510 (opinion of WHITE, J., joined by Stewart, MARSHALL, and POWELL, JJ.); *id.*, at 552 (STEVENS, J., dissenting in part); *id.*, at 559–561 (BURGER, C. J., dissenting); *id.*, at 570 (REHNQUIST, J., dissenting).[25] JUSTICE WHITE, writing for the plurality, expressly concluded that the city's esthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards; San Diego's interest in its appearance was undoubtedly a substantial governmental goal. *Id.*, at 507–508.[26]

We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit. "[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 71 (plurality opinion).

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[25] The Court of Appeals relied on JUSTICE BRENNAN'S opinion concurring in the judgment in *Metromedia* to support its conclusion that the City's interest in esthetics was not sufficiently substantial to outweigh the constitutional interest in free expression unless the City proved that it had undertaken a comprehensive and coordinated effort to remove other elements of visual clutter within San Diego. This reliance was misplaced because JUSTICE BRENNAN'S analysis was expressly rejected by a majority of the Court. Moreover, JUSTICE BRENNAN was concerned that the San Diego ordinance might not in fact have a substantial salutary effect on the appearance of the city because it did not ameliorate other types of visual clutter beside billboards, see 453 U. S., at 530–534, thus suggesting that in fact it had been applied to areas where it did not advance the interest in esthetics sufficiently to justify an abridgment of speech.

[26] Similarly, THE CHIEF JUSTICE wrote that a city has the power to regulate visual clutter in much the same manner that it can regulate any other feature of its environment: "Pollution is not limited to the air we breathe and the water we drink; it can equally offend the eye and ear." *Id.*, at 561 (dissenting opinion).

IV

We turn to the question whether the scope of the restriction on appellees' expressive activity is substantially broader than necessary to protect the City's interest in eliminating visual clutter. The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. See, *e. g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 68–71 (1981); *Carey* v. *Brown*, 447 U. S., at 470–471 (1980); *Grayned* v. *City of Rockford*, 408 U. S. 104, 115–117 (1972); *Police Department of Chicago* v. *Mosley*, 408 U. S., at 98. The District Court found that the signs prohibited by the ordinance do constitute visual clutter and blight. By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy.[27] The plurality wrote in *Metromedia:* "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" 453 U. S., at 510. The same is true of posted signs.

It is true that the esthetic interest in preventing the kind of litter that may result from the distribution of leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizen's exercise of that method of expressing his views. In *Schneider* v. *State*, 308 U. S. 147 (1939), the Court held that ordinances that absolutely prohibited handbilling on the streets were invalid. The Court explained that cities could adequately protect the esthetic inter-

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[27] In *Metromedia*, a majority of the Court concluded that a prohibition on billboards was narrowly tailored to the visual evil San Diego sought to correct. See 453 U. S., at 510–512 (plurality opinion); *id.*, at 549–553 (STEVENS, J., dissenting in part); *id.*, at 560–561 (BURGER, C. J., dissenting); *id.*, at 570 (REHNQUIST, J., dissenting).

est in avoiding litter without abridging protected expression merely by penalizing those who actually litter. See *id.*, at 162. Taxpayers contend that their interest in supporting Vincent's political campaign, which affords them a constitutional right to distribute brochures and leaflets on the public streets of Los Angeles, provides equal support for their asserted right to post temporary signs on objects adjacent to the streets and sidewalks. They argue that the mere fact that their temporary signs "add somewhat" to the city's visual clutter is entitled to no more weight than the temporary unsightliness of discarded handbills and the additional street-cleaning burden that were insufficient to justify the ordinances reviewed in *Schneider*.

The rationale of *Schneider* is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. In this case, appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed. As the Court expressly noted in *Schneider*, the First Amendment does not "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." 308 U. S., at 160–161. In short, there is no constitutional impediment to "the punishment of those who actually throw papers on the streets." *Id.*, at 162. A distributor of leaflets has no right simply to scatter his pamphlets in the air—or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance. The right recognized in

Schneider is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground. One who is rightfully on a street open to the public "carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas*, 318 U. S. 413, 416 (1943); see also *Cox* v. *Louisiana*, 379 U. S. 559, 578 (1965) (Black, J., dissenting in part).

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil—visual blight—is not merely a possible byproduct of the activity, but is created by the medium of expression itself. In contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

V

The Court of Appeals accepted the argument that a prohibition against the use of unattractive signs cannot be justified on esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located. A comparable argument was categorically rejected in *Metromedia*. In that case it was argued that the city could not simultaneously permit billboards to be used for onsite advertising and also justify the prohibition against offsite advertising on esthetic grounds, since both types of advertising were equally un-

attractive. The Court held, however, that the city could reasonably conclude that the esthetic interest was outweighed by the countervailing interest in one kind of advertising even though it was not outweighed by the other.[28] So here, the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. Moreover, by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved, and private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds. Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance.

Furthermore, there is no finding that in any area where appellees seek to place signs, there are already so many signs posted on adjacent private property that the elimination of appellees' signs would have an inconsequential effect on the esthetic values with which the City is concerned. There is simply no predicate in the findings of the District Court for

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[28] "In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." 453 U. S., at 511.

"Third, San Diego has obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance—onsite commercial advertising—its interests should yield. We do not reject that judgment." *Id.*, at 512.

THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE STEVENS agreed with the plurality on this point. *Id.*, at 541 (STEVENS, J., dissenting in part); *id.*, at 563–564 (BURGER, C. J., dissenting); *id.*, at 570 (REHNQUIST, J., dissenting).

the conclusion that the prohibition against the posting of appellees' signs fails to advance the City's esthetic interest.

VI

While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S., at 647, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. See, *e. g.*, *United States* v. *Grace*, 461 U. S. 171, 177 (1983); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S., at 654–655; *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S., at 535; *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93 (1977). The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.[29] To the extent that the posting of signs on public property has advantages over these forms of expression, see, *e. g.*, *Talley* v. *California*, 362 U. S. 60, 64–65 (1960), there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.[30]

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[29] Cf. *Schneider* v. *State*, 308 U. S., at 163 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

[30] Although the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be

VII

Appellees suggest that the public property covered by the ordinance either is itself a "public forum" for First Amendment purposes, or at least should be treated in the same respect as the "public forum" in which the property is located. "Traditional public forum property occupies a special position in terms of First Amendment protection," *United States* v. *Grace*, 461 U. S., at 180, and appellees maintain that their sign-posting activities are entitled to this protection.

In *Hague* v. *CIO*, 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.), it was recognized:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and

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important to a large segment of the citizenry, see, *e. g.*, *Martin* v. *Struthers*, 319 U. S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people"), this solicitude has practical boundaries, see, *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77, 88–89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open"). See also *Metromedia, Inc.* v. *San Diego*, 453 U. S., at 549–550 (STEVENS, J., dissenting in part) (ban on graffiti constitutionally permissible even though some creators of graffiti may have no equally effective alternative means of public expression).

good order; but it must not, in the guise of regulation, be abridged or denied."

See also *Grayned* v. *City of Rockford*, 408 U. S., at 115; *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147, 152 (1969); *Kunz* v. *New York*, 340 U. S. 290, 293 (1951); *Schneider* v. *State*, 308 U. S., at 163.

Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981). Rather, the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983).

Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. Cf. *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S., at 131.[31] Public property which is not by tradition or designation a forum for

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[31] Any tangible property owned by the government could be used to communicate—bumper stickers may be placed on official automobiles—and yet appellees could not seriously claim the right to attach "Taxpayer for Vincent" bumper stickers to city-owned automobiles. At some point, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things, and in such circumstances, the State, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966).

public communication may be reserved by the State "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S., at 46. Given our analysis of the legitimate interest served by the ordinance, its viewpoint neutrality, and the availability of alternative channels of communication, the ordinance is certainly constitutional as applied to appellees under this standard.[22]

VIII

Finally, Taxpayers and COGS argue that Los Angeles could have written an ordinance that would have had a less severe effect on expressive activity such as theirs, by permitting the posting of any kind of sign at any time on some types of public property, or by making a variety of other more specific exceptions to the ordinance: for signs carrying certain types of messages (such as political campaign signs), for signs posted during specific time periods (perhaps during political campaigns), for particular locations (perhaps for areas already cluttered by an excessive number of signs on adjacent private property), or for signs meeting design specifications (such as size or color). Plausible public policy arguments

[22] Just as it is not dispositive to label the posting of signs on public property as a discrete medium of expression, it is also of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum. Generally an analysis of whether property is a public forum provides a workable analytical tool. However, "the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges," *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 132 (1981), and this is particularly true in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of citizens at large.

might well be made in support of any such exception, but it by no means follows that it is therefore constitutionally mandated, cf. *Singer* v. *United States*, 380 U. S. 24, 34–35 (1965), nor is it clear that some of the suggested exceptions would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent—City Council." See *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231–232 (1977).[23] To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972). Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combating visual blight.

Any constitutionally mandated exception to the City's total prohibition against temporary signs on public property would necessarily rest on a judicial determination that the City's traffic control and safety interests had little or no applicability within the excepted category, and that the City's interests in esthetics are not sufficiently important to justify the prohibition in that category. But the findings of the District Court provide no basis for questioning the substantiality of the esthetic interest at stake, or for believing that a uniquely important form of communication has been abridged for the categories of expression engaged in by Taxpayers and COGS. Therefore, we accept the City's position that it may decide that the esthetic interest in avoiding "visual clutter" justifies

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[23] See generally *Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217, 223 (1967).

a removal of signs creating or increasing that clutter. The findings of the District Court that COGS signs add to the problems addressed by the ordinance and, if permitted to remain, would encourage others to post additional signs, are sufficient to justify application of the ordinance to these appellees.

As recognized in *Metromedia*, if the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, "then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." 453 U. S., at 508. As is true of billboards, the esthetic interests that are implicated by temporary signs are presumptively at work in all parts of the city, including those where appellees posted their signs, and there is no basis in the record in this case upon which to rebut that presumption. These interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas. We hold that on this record these interests are sufficiently substantial to justify this content-neutral, impartially administered prohibition against the posting of appellees' temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964).[34]

The judgment of the Court of Appeals is reversed, and the case is remanded to that Court.

It is so ordered.

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[34] Taxpayers and COGS also argue that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment because (1) it contains certain exceptions for street banners and certain permanent signs such as commemorative plaques, and (2) it gives property owners, who may authorize the posting of signs on their own premises, an advantage over nonproperty owners in political campaigns. These arguments do not appear to have been addressed by the Court of Appeals.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The plurality opinion in *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981), concluded that the City of San Diego could, consistently with the First Amendment, restrict the commercial use of billboards in order to "preserve and improve the appearance of the City." *Id.*, at 493. Today, the Court sustains the constitutionality of Los Angeles' similarly motivated ban on the posting of political signs on public property. Because the Court's lenient approach towards the restriction of speech for reasons of aesthetics threatens seriously to undermine the protections of the First Amendment, I dissent.

The Court finds that the City's "interest [in eliminating visual clutter] is sufficiently substantial to justify the effect of the ordinance on appellees' expression" and that the effect of the ordinance on speech is "no greater than necessary to accomplish the City's purpose." *Ante*, at 805. These are the right questions to consider when analyzing the constitutionality of the challenged ordinance, see *Metromedia*, *supra*, at 525–527 (BRENNAN, J., concurring in judgment); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 656 (1981) (BRENNAN, J., concurring in part and dissenting in part), but the answers that the Court provides reflect a startling insensitivity to the principles embodied in the First Amendment. In my view, the City of Los Angeles has not shown that its interest in eliminating "visual clutter" justifies its restriction of appellees' ability to communicate with the local electorate.

I

The Court recognizes that each medium for communicating ideas and information presents its own particular problems. Our analysis of the First Amendment concerns implicated by a given medium must therefore be sensitive to these particular problems and characteristics. The posting of signs is,

of course, a time-honored means of communicating a broad range of ideas and information, particularly in our cities and towns. At the same time, the unfettered proliferation of signs on public fixtures may offend the public's legitimate desire to preserve an orderly and aesthetically pleasing urban environment. In this case, as in *Metromedia*, we are called upon to adjudge the constitutionality under the First Amendment of a local government's response to this recurring dilemma—namely, the clash between the public's aesthetic interest in controlling the use of billboards, signs, handbills, and other similar means of communication, and the First Amendment interest of those who wish to use these media to express their views, or to learn the views of others, on matters of importance to the community.

In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. There may be alternative channels of communication, but the prevalence of a large number of signs in Los Angeles[1] is a strong indication that, for many speakers, those alternatives are far less satisfactory. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 556 (1975).

Nevertheless, the City of Los Angeles asserts that ample alternative avenues of communication are available. The City notes that, although the posting of signs on public property is prohibited, the posting of signs on private property and the distribution of handbills are not. Brief for Appellants

[1] According to the Court of Appeals, street inspection personnel removed 51,662 illegally posted signs between January 1, 1980, and May 24, 1980. 682 F. 2d 847, 853, n. 6. (1982).

25–26. But there is no showing that either of these alternatives would serve appellees' needs nearly as well as would the posting of signs on public property. First, there is no proof that a sufficient number of private parties would allow the posting of signs on their property. Indeed, common sense suggests the contrary at least in some instances. A speaker with a message that is generally unpopular or simply unpopular among property owners is hardly likely to get his message across if forced to rely on this medium. It is difficult to believe, for example, that a group advocating an increase in the rate of a property tax would succeed in persuading private property owners to accept its signs.

Similarly, the adequacy of distributing handbills is dubious, despite certain advantages of handbills over signs. See *Martin* v. *Struthers*, 319 U. S. 141, 145–146 (1943). Particularly when the message to be carried is best expressed by a few words or a graphic image, a message on a sign will typically reach far more people than one on a handbill. The message on a posted sign remains to be seen by passersby as long as it is posted, while a handbill is typically read by a single reader and discarded. Thus, not only must handbills be printed in large quantity, but many hours must be spent distributing them. The average cost of communicating by handbill is therefore likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless "essential to the poorly financed causes of little people," *id.*, at 146, and their prohibition constitutes a total ban on an important medium of communication. Cf. Stone, Fora Americana: Speech in Public Places, 1974 S. Ct. Rev. 233, 257. Because the City has completely banned the use of this particular medium of communication, and because, given the circumstances, there are no equivalent alternative media that provide an adequate substitute, the Court must examine with particular care the justifications that the City proffers for its ban. See *Metromedia*, *supra*, at 525–527 (BRENNAN, J., concur-

ring in judgment); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93 (1977).

II

As the Court acknowledges, *ante*, at 805, when an ordinance significantly limits communicative activity, "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation." *Schneider* v. *State*, 308 U. S. 147, 161 (1939). The Court's first task is to determine whether the ordinance is aimed at suppressing the content of speech, and, if it is, whether a compelling state interest justifies the suppression. *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 540 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 99 (1972). If the restriction is content-neutral, the court's task is to determine (1) whether the governmental objective advanced by the restriction is substantial, and (2) whether the restriction imposed on speech is no greater than is essential to further that objective. Unless both conditions are met the restriction must be invalidated. See *ante*, at 805, 808, 810.[2]

My suggestion in *Metromedia* was that courts should exercise special care in addressing these questions when a purely aesthetic objective is asserted to justify a restriction of speech. Specifically, "before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment." 453 U. S., at 531. I adhere to that view. Its correctness—premised largely on my concern that aesthetic interests are easy for a city to assert and difficult for a court to evaluate—is, for me, reaffirmed by this case.

The fundamental problem in this kind of case is that a purely aesthetic state interest offered to justify a restriction on speech—that is, a governmental objective justified solely

[2] Of course, a content-neutral restriction must also leave open ample alternative avenues of communication. See *supra*, at 819–820, and this page.

in terms like "proscribing intrusive and unpleasant formats for expression," *ante*, at 806—creates difficulties for a reviewing court in fulfilling its obligation to ensure that government regulation does not trespass upon protections secured by the First Amendment. The source of those difficulties is the unavoidable subjectivity of aesthetic judgments—the fact that "beauty is in the eye of the beholder." As a consequence of this subjectivity, laws defended on aesthetic grounds raise problems for judicial review that are not presented by laws defended on more objective grounds—such as national security, public health, or public safety.[3] In practice, therefore, the inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to make the required inquiries.[4]

A

Initially, a reviewing court faces substantial difficulties determining whether the actual objective is related to the suppression of speech. The asserted interest in aesthetics may be only a facade for content-based suppression. Of course, all would agree that the improvement and preser-

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[3] Safety, health, and national security have their subjective aspects as well, but they are not wholly subjective. When these objectives are invoked to justify a restriction of speech, courts can broadly judge their plausibility. This is not true of aesthetics.

[4] As one scholar has stated:

"Aesthetic policy, as currently formulated and implemented at the federal, state, and local levels, often partakes more of high farce than of the rule of law. Its purposes are seldom accurately or candidly portrayed, let alone understood, by its most vehement champions. Its diversion to dubious or flatly deplorable social ends undermines the credit that it may merit when soundly conceived and executed. Its indiscriminate, often quixotic demands have overwhelmed legal institutions, which all too frequently have compromised the integrity of legislative, administrative, and judicial processes in the name of 'beauty.'" Costonis, Law and Aesthetics: A Critique and a Reformation of the Dilemmas, 80 Mich. L. Rev. 355 (1982).

vation of the aesthetic environment are important governmental functions, and that some restrictions on speech may be necessary to carry out these functions. *Metromedia, supra*, at 530. But a governmental interest in aesthetics cannot be regarded as sufficiently compelling to justify a restriction of speech based on an assertion that the content of the speech is, in itself, aesthetically displeasing. *Cohen* v. *California*, 403 U. S. 15 (1971). Because aesthetic judgments are so subjective, however, it is too easy for government to enact restrictions on speech for just such illegitimate reasons and to evade effective judicial review by asserting that the restriction is aimed at some displeasing aspect of the speech that is not solely communicative—for example, its sound, its appearance, or its location. An objective standard for evaluating claimed aesthetic judgments is therefore essential; for without one, courts have no reliable means of assessing the genuineness of such claims.

For example, in evaluating the ordinance before us in this case, the City might be pursuing either of two objectives, motivated by two very different judgments. One objective might be the elimination of "visual clutter," attributable in whole or in part to signs posted on public property. The aesthetic judgment underlying this objective would be that the clutter created by these signs offends the community's desire for an orderly, visually pleasing environment. A second objective might simply be the elimination of the messages typically carried by the signs.[5] In that case, the aesthetic judgment would be that the signs' messages are themselves displeasing. The first objective is lawful, of course, but the second is not. Yet the City might easily mask the second

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[5]The fact that a ban on temporary signs applies to all signs does not necessarily imply content-neutrality. Because particular media are often used disproportionately for certain types of messages, a restriction that is content-neutral on its face may, in fact, be content-hostile. Cf. Stone, Fora Americana: Speech in Public Places, 1974 S. Ct. Rev. 233, 257.

objective by asserting the first and declaring that signs constitute visual clutter. In short, we must avoid unquestioned acceptance of the City's bare declaration of an aesthetic objective lest we fail in our duty to prevent unlawful trespasses upon First Amendment protections.

B

A total ban on an important medium of communication may be upheld only if the government proves that the ban (1) furthers a substantial government objective, and (2) constitutes the least speech-restrictive means of achieving that objective. *Schad* v. *Mount Ephraim*, 452 U. S. 61 (1981). Here too, however, meaningful judicial application of these standards is seriously frustrated.

(1)

No one doubts the importance of a general governmental interest in aesthetics, but in order to justify a restriction of speech, the particular objective behind the restriction must be substantial. *E. g.*, *United States* v. *Grace*, 461 U. S. 171, 177 (1983); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983); *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). Therefore, in order to uphold a restriction of speech imposed to further an aesthetic objective, a court must ascertain the substantiality of the specific objective pursued. Although courts ordinarily defer to the government's assertion that its objective is substantial, that assertion is not immune from critical examination. See, *e. g.*, *Schad* v. *Mount Ephraim*, *supra*, at 72–73. This is particularly true when aesthetic objectives underlie the restrictions. But in such cases independent judicial assessment of the substantiality of the government's interest is difficult. Because aesthetic judgments are entirely subjective, the government may too easily overstate the substantiality of its goals. Accordingly, unless courts carefully scrutinize

aesthetics-based restrictions of speech, they risk standing idly by while important media of communication are foreclosed for the sake of insubstantial governmental objectives.

(2)

Similarly, when a total ban is justified solely in terms of aesthetics, the means inquiry necessary to evaluate the constitutionality of the ban may be impeded by deliberate or unintended government manipulation. Governmental objectives that are purely aesthetic can usually be expressed in a virtually limitless variety of ways. Consequently, objectives can be tailored to fit whatever program the government devises to promote its general aesthetic interests. Once the government has identified a substantial aesthetic objective and has selected a preferred means of achieving its objective, it will be possible for the government to correct any mismatch between means and ends by redefining the ends to conform with the means.

In this case, for example, any of several objectives might be the City's actual substantial goal in banning temporary signs: (1) the elimination of all signs throughout the City, (2) the elimination of all signs in certain parts of the City, or (3) a reduction of the density of signs. Although a total ban on the posting of signs on public property would be the least restrictive means of achieving only the first objective, it would be a very effective means of achieving the other two as well. It is quite possible, therefore, that the City might select such a ban as the means by which to further its general interest in solving its sign problem, without explicitly considering which of the three specific objectives is really substantial. Then, having selected the total ban as its preferred means, the City would be strongly inclined to characterize the first objective as the substantial one. This might be done purposefully in order to conform the ban to the least-restrictive-means requirement, or it might be done inadvertently as a natural

concomitant of considering means and ends together. But regardless of why it is done, a reviewing court will be confronted with a statement of substantiality the subjectivity of which makes it impossible to question on its face.

This possibility of interdependence between means and ends in the development of policies to promote aesthetics poses a major obstacle to judicial review of the availability of alternative means that are less restrictive of speech. Indeed, when a court reviews a restriction of speech imposed in order to promote an aesthetic objective, there is a significant possibility that the court will be able to do little more than pay lipservice to the First Amendment inquiry into the availability of less restrictive alternatives. The means may fit the ends only because the ends were defined with the means in mind. In this case, for example, the City has expressed an aesthetic judgment that signs on public property constitute visual clutter throughout the City and that its objective is to eliminate visual clutter. We are then asked to determine whether that objective could have been achieved with less restriction of speech. But to ask the question is to highlight the circularity of the inquiry. Since the goal, at least as currently expressed, is essentially to eliminate all signs, the only available means of achieving that goal is to eliminate all signs.

The ease with which means can be equated with aesthetic ends only confirms the importance of close judicial scrutiny of the substantiality of such ends. See *supra*, at 824–825. In this case, for example, it is essential that the Court assess the City's ban on signs by evaluating whether the City has a substantial interest in eliminating the visual clutter caused by *all* posted signs *throughout* the City—as distinguished from an interest in banning signs in some areas or in preventing densely packed signs. If, in fact, either of the latter two objectives constitute the substantial interest underlying this ordinance, they could be achieved by means far less restric-

tive of speech than a total ban on signs, and the ban, therefore, would be invalid.

C

Regrettably, the Court's analysis is seriously inadequate. Because the Court has failed to develop a reliable means of gauging the nature or depth of the City's commitment to pursuing the goal of eradicating "visual clutter," it simply approves the ordinance with only the most cursory degree of judicial oversight. Without stopping to consider carefully whether this supposed commitment is genuine or substantial, the Court essentially defers to the City's aesthetic judgment and in so doing precludes serious assessment of the availability of alternative means.

The Court begins by simply affirming that "[t]he problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive end within the City's power to prohibit." *Ante*, at 807. Then, addressing the availability of less restrictive alternatives, the Court can do little more than state the unsurprising conclusion that "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." *Ante*, at 808. Finally, as if to explain the ease with which it reaches its conclusion, the Court notes that "[w]ith respect to signs posted by appellees . . . it is the tangible medium of expressing the message that has adverse impact on the appearance of the landscape." *Ante*, at 810. But, as I have demonstrated, it is precisely the ability of the State to make this judgment that should lead us to approach these cases with more caution.

III

The fact that there are difficulties inherent in judicial review of aesthetics-based restrictions of speech does not imply

that government may not engage in such activities. As I have said, improvement and preservation of the aesthetic environment are often legitimate and important governmental functions. But because the implementation of these functions creates special dangers to our First Amendment freedoms, there is a need for more stringent judicial scrutiny than the Court seems willing to exercise.

In cases like this, where a total ban is imposed on a particularly valuable method of communication, a court should require the government to provide tangible proof of the legitimacy and substantiality of its aesthetic objective. Justifications for such restrictions articulated by the government should be critically examined to determine whether the government has committed itself to addressing the identified aesthetic problem.

In my view, such statements of aesthetic objectives should be accepted as substantial and unrelated to the suppression of speech only if the government demonstrates that it is pursuing an identified objective seriously and comprehensively and in ways that are unrelated to the restriction of speech. *Metromedia*, 453 U. S., at 531 (BRENNAN, J., concurring in judgment). Without such a demonstration, I would invalidate the restriction as violative of the First Amendment. By requiring this type of showing, courts can ensure that governmental regulation of the aesthetic environment remains within the constraints established by the First Amendment. First, we would have a reasonably reliable indication that it is not the content or communicative aspect of speech that the government finds unaesthetic. Second, when a restriction of speech is part of a comprehensive and seriously pursued program to promote an aesthetic objective, we have a more reliable indication of the government's own assessment of the substantiality of its objective. And finally, when an aesthetic objective is pursued on more than one front, we have a better basis upon which to ascertain its precise nature

and thereby determine whether the means selected are the least restrictive ones for achieving the objective.[6]

This does not mean that a government must address all aesthetic problems at one time or that a government should hesitate to pursue aesthetic objectives. What it does mean, however, is that when such an objective is pursued, it may not be pursued solely at the expense of First Amendment freedoms, nor may it be pursued by arbitrarily discriminating against a form of speech that has the same aesthetic characteristics as other forms of speech that are also present in the community. See *Metromedia*, *supra*, at 531–534 (BRENNAN, J., concurring in judgment).

Accordingly, in order for Los Angeles to succeed in defending its total ban on the posting of signs, the City would have to demonstrate that it is pursuing its goal of eliminating visual clutter in a serious and comprehensive manner. Most importantly, the City would have to show that it is pursuing its goal through programs other than its ban on signs, that at least some of those programs address the visual clutter problem through means that do not entail the restriction of speech, and that the programs parallel the ban in their stringency, geographical scope, and aesthetic focus. In this case, however, as the Court of Appeals found, there is no indication that the City has addressed its visual clutter problem in any way other than by prohibiting the posting of signs—

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[6] It is theoretically, though remotely, possible that a form of speech could be so distinctively unaesthetic that a comprehensive program aimed at eliminating the eyesore it causes would apply only to the unpleasant form of speech. Under the approach I suggest, such a program would be invalid because it would only restrict speech, and the community, therefore, would have to tolerate the displeasing form of speech. This is no doubt a disadvantage of the approach. But at least when the form of speech that is restricted constitutes an important medium of communication and when the restriction would effect a total ban on the use of that medium, that is the price we must pay to protect our First Amendment liberties from those who would use aesthetics alone as a cloak to abridge them.

throughout the City and without regard to the density of their presence. 682 F. 2d 847, 852 (CA9 1982). Therefore, I would hold that the prohibition violates appellees' First Amendment rights.

In light of the extreme stringency of Los Angeles' ban—barring all signs from being posted—and its wide geographical scope—covering the entire City—it might be difficult for Los Angeles to make the type of showing I have suggested. Cf. *Metromedia*, *supra*, at 533–534. A more limited approach to the visual clutter problem, however, might well pass constitutional muster. I have no doubt that signs posted on public property in certain areas—including, perhaps, parts of Los Angeles—could contribute to the type of eyesore that a city would genuinely have a substantial interest in eliminating. These areas might include parts of the City that are particularly pristine, reserved for certain uses, designated to reflect certain themes, or so blighted that broad-gauged renovation is necessary. Presumably, in these types of areas, the City would also regulate the aesthetic environment in ways other than the banning of temporary signs. The City might zone such areas for a particular type of development or lack of development; it might actively create a particular type of environment; it might be especially vigilant in keeping the area clean; it might regulate the size and location of permanent signs; or it might reserve particular locations, such as kiosks, for the posting of temporary signs. Similarly, Los Angeles might be able to attack its visual clutter problem in more areas of the City by reducing the stringency of the ban, perhaps by regulating the density of temporary signs, and coupling that approach with additional measures designed to reduce other forms of visual clutter. There are a variety of ways that the aesthetic environment can be regulated, some restrictive of speech and others not, but it is only when aesthetic regulation is addressed in a comprehensive and focused manner that we can ensure that the

goals pursued are substantial and that the manner in which they are pursued is no more restrictive of speech than is necessary.

In the absence of such a showing in this case, I believe that Los Angeles' total ban sweeps so broadly and trenches so completely on appellees' use of an important medium of political expression that it must be struck down as violative of the First Amendment.[7]

I therefore dissent.

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[7] Although the Court does not reach the question, appellants argue that the City's interest in traffic safety provides an independent and significant justification for its ban on signs. As the Court of Appeals concluded, however, "[t]he City has not offered to prove facts that raise any genuine issue regarding traffic safety hazards with respect to the posting of signs on many of the objects covered by the ordinance." 682 F. 2d, at 852.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 831 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM MARCH 26 THROUGH MAY 14, 1984

MARCH 26, 1984

Appeals Dismissed

No. 83–1262. SOUTHEAST VOLUSIA HOSPITAL DISTRICT ET AL. *v.* FLORIDA PATIENT'S COMPENSATION FUND ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 438 So. 2d 815.

No. 83–6251. PRENZLER *v.* WORKERS COMPENSATION APPEALS BOARD. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 82–1538. HILLSDALE COLLEGE *v.* DEPARTMENT OF EDUCATION ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Grove City College* v. *Bell*, 465 U. S. 555 (1984). Reported below: 696 F. 2d 418.

Vacated and Remanded After Certiorari Granted

No. 83–103. WOODKRAFT DIVISION, GEORGIA KRAFT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. [Certiorari granted, 464 U. S. 981.] Upon consideration of the motion of the Solicitor General and the response filed thereto, that portion of the judgment of the Court of Appeals on which certiorari was granted is vacated, and the case is remanded to the Court of Appeals with directions that the case be remanded to the National Labor Relations Board for further consideration in light of *Clear Pine Mouldings, Inc.*, 268 N. L. R. B. 1044 (1984).

Miscellaneous Orders

No. ———. IN RE O'BRYAN. Motion for leave to file petition for writ of habeas corpus denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the motion and vacate the death sentence in this case.

No. ——. PEZ MEX, S. A. *v.* CONSOLIDATED FOODS CORP. ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–755 (83–6413). BURGER *v.* ZANT, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending final disposition of the petition for writ of certiorari.

No. D–374. IN RE DISBARMENT OF MCGHEE. Disbarment entered. [For earlier order herein, see 464 U. S. 926.]

No. D–382. IN RE DISBARMENT OF LABER. Disbarment entered. [For earlier order herein, see 464 U. S. 988.]

No. D–385. IN RE DISBARMENT OF DRAWDY. Disbarment entered. [For earlier order herein, see 464 U. S. 958.]

No. D–391. IN RE DISBARMENT OF DROBNY. Disbarment entered. [For earlier order herein, see 464 U. S. 1066.]

No. D–392. IN RE DISBARMENT OF SINEMA. Disbarment entered. [For earlier order herein, see 464 U. S. 1066.]

No. D–402. IN RE DISBARMENT OF YOUNG. Nancy J. Young, of Cos Cob, Conn., having requested to resign as a member of the Bar of this Court, it is ordered that her name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 27, 1984 [465 U. S. 1063], is hereby discharged.

No. D–415. IN RE DISBARMENT OF LUOMA. It is ordered that Robert W. Luoma, of Lansing, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–1273. LEWIS SERVICE CENTER, INC. *v.* MACK TRUCKS, INC. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–6197. IN RE JOHNSON. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 83–240. LAWRENCE COUNTY ET AL. *v.* LEAD-DEADWOOD SCHOOL DISTRICT NO. 40–1. Appeal from Sup. Ct. S. D. Probable jurisdiction noted. Reported below: 334 N. W. 2d 24.

Certiorari Granted

No. 83–1153. MILLS MUSIC, INC. *v.* SNYDER ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 720 F. 2d 733.

No. 83–1266. UNITED STATES *v.* BOYLE, EXECUTOR OF THE ESTATE OF BOYLE. C. A. 7th Cir. Certiorari granted. Reported below: 710 F. 2d 1251.

No. 83–703. FLORIDA POWER & LIGHT CO. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL.; and

No. 83–1031. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* LORION ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 229 U. S. App. D. C. 440, 712 F. 2d 1472.

No. 83–912. LUCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 713 F. 2d 1236.

Certiorari Denied. (See also No. 83–6251, *supra.*)

No. 82–1683. WEST TEXAS STATE UNIVERSITY ET AL. *v.* BENNETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 2d 1215.

No. 83–824. PATMON, YOUNG & KIRK ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 1101.

No. 83–888. JACOB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1093.

No. 83–941. IOWA ELECTRIC LIGHT & POWER CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 717 F. 2d 433.

No. 83–975. PATMON, YOUNG & KIRK ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 1101.

No. 83–1012. BAGBEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 680.

No. 83–1024. TRIO MANUFACTURING CO. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 718 F. 2d 1015.

No. 83–1066. JACK REILLY'S, INC., DBA JACK'S *v.* THURBER. C. A. 1st Cir. Certiorari denied. Reported below: 717 F. 2d 633.

No. 83–1077. PARTEE *v.* SAN DIEGO CHARGERS FOOTBALL CO. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 3d 378, 668 P. 2d 674.

No. 83–1124. NATIONAL COMMITTEE ET AL. *v.* MORGENTHAU, DISTRICT ATTORNEY OF NEW YORK COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83–1143. CAPTLINE ET AL., CO-EXECUTORS OF THE ESTATE OF MAZZARO *v.* COUNTY OF ALLEGHENY ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 74 Pa. Commw. 85, 459 A. 2d 1298.

No. 83–1260. PFEIFER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1113.

No. 83–1268. L. & L. HOWELL, INC. *v.* CINCINNATI COOPERATIVE MILK SALES ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 903.

No. 83–1281. SANCHEZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 1114.

No. 83–1283. ALEXANDER *v.* BOARD OF PROFESSIONAL RESPONSIBILITY OF THE DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 466 A. 2d 447.

No. 83–1293. CARPENTER *v.* COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 115 Wis. 2d 211, 339 N. W. 2d 608.

No. 83–1296. BREEDLOVE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 439 So. 2d 1326.

No. 83–1303. JONES *v.* MARSH, SECRETARY OF THE ARMY. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 1099.

No. 83–1305. BUCHANAN *v.* MERIT BOARD OF THE STATE UNIVERSITIES CIVIL SERVICE SYSTEM OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 115 Ill. App. 3d 722, 450 N. E. 2d 1298.

No. 83–1306. BINGHAM *v.* NEVADA STATE BOARD OF ACCOUNTANCY. Sup. Ct. Nev. Certiorari denied.

No. 83–1319. GARAFOLA *v.* WILKINSON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 721 F. 2d 420.

No. 83–1354. SANKARY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 747.

No. 83–1370. CHRISTENSEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83–1376. MARTIN ROOFING, INC. *v.* GOLDSTEIN. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 262, 457 N. E. 2d 700.

No. 83–1384. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 816.

No. 83–1385. BROWN ET UX. *v.* SKI ROUNDTOP, INC., TDBA SKI LIBERTY. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 896.

No. 83–1388. ARNOLD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1444.

No. 83–1404. PITEO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 50.

No. 83–1415. GLOVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 233 U. S. App. D. C. 161, 725 F. 2d 120.

No. 83–1417. LISOTTO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 85.

No. 83–1419. AVERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 1020.

No. 83–1435. MARAMONTE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-1440. DOWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 599.

No. 83-5736. SCOTT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 83-5806. TOWNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 681.

No. 83-5821. DUARTE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83-5832. WILLIAMS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83-5847. COPPOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 720 F. 2d 757.

No. 83-5985. SEARLES *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 214 Neb. 849, 336 N. W. 2d 571.

No. 83-6001. ALMON *v.* JERNIGAN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 1505.

No. 83-6147. ROBINSON *v.* HADDEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 723 F. 2d 59.

No. 83-6182. TILLIS *v.* JAMES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 820.

No. 83-6183. SMITH *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 677.

No. 83-6189. VAN HOORELBEKE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6201. SPEARS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 83-6203. PIATKOWSKA *v.* INTERINSURANCE EXCHANGE OF THE AAA AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6208. JUTRAS *v.* GULF FLEET MARINE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1397.

No. 83–6210. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 115 Ill. App. 3d 1159, 461 N. E. 2d 1087.

No. 83–6212. HOLSEY *v.* TINNEY, WARDEN, ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 83–6219. KELLEHER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 116 Ill. App. 3d 186, 452 N. E. 2d 143.

No. 83–6228. ROCHE *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 83–6256. MCFALL *v.* PARKE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83–6267. BROOKS *v.* ASHTABULA COUNTY WELFARE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 263.

No. 83–6289. MARTÍNEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 83–6299. MULLEN *v.* BROWN ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–6301. MILAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 905.

No. 83–6304. WHITE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–6317. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83–6320. LARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 139.

No. 83–6322. HIBBARD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 661 S. W. 2d 473.

No. 83–6330. RIEGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83–6336. EACOPELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 913.

No. 83-6343. GUERRERO-SERQUEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 83-741. FALCONE V. INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 646.

JUSTICE WHITE, dissenting.

Petitioner, a tax attorney, requested information from the Internal Revenue Service under the Freedom of Information Act (FOIA), 5 U. S. C. § 552. When the IRS denied the request, petitioner filed an action in Federal District Court under 5 U. S. C. § 552(a)(4)(B). The District Court ordered that certain requested documents be released, and the subsequent appeal was dismissed at the IRS's request.

Petitioner then filed a motion for attorney's fees under 5 U. S. C. § 552(a)(4)(E), which provides for an award of "reasonable attorney fees" to a plaintiff who has "substantially prevailed" in an FOIA case. The District Court denied the motion, finding that although petitioner had prevailed, the IRS had not acted unreasonably in refusing to release the documents. 535 F. Supp. 1313 (ED Mich. 1982). The Court of Appeals for the Sixth Circuit affirmed that ruling but on a different ground, concluding that § 552(a)(4)(E) does not authorize an attorney's fees award for *pro se* attorney plaintiffs. 714 F. 2d 646 (1983).

Most Courts of Appeals, including the Court of Appeals for the Sixth Circuit, have concluded that a nonattorney plaintiff proceeding *pro se* is not entitled to recover attorney's fees under § 552(a)(4)(E) or similar attorney's fees provisions. See, *e. g.*, *Wolfel* v. *United States*, 711 F. 2d 66, 68 (CA6 1983); *Clarkson* v. *IRS*, 678 F. 2d 1368, 1371 (CA11 1982); *Cunningham* v. *FBI*, 664 F. 2d 383, 388 (CA3 1981); *Barrett* v. *Bureau of Customs*, 651 F. 2d 1087, 1090 (CA5 1981), cert. denied, 455 U. S. 950 (1982); *Crooker* v. *United States Department of Justice*, 632 F. 2d 916 (CA1 1980); *Burke* v. *United States Department of Justice*, 559 F. 2d 1182 (CA10 1977), aff'g 432 F. Supp. 251 (Kan. 1976); but see *Cox* v. *United States Department of Justice*, 195 U. S. App. D. C. 189, 193–194, 601 F. 2d 1, 5–6 (1979). However, the Court of Appeals for the Fifth Circuit has held that, unlike their nonattorney counterparts, FOIA plaintiffs who are attorneys are not precluded from recovering attorney's fees by virtue of their *pro se* status. *Cazalas* v. *United States Department of Justice*, 709 F. 2d 1051,

1055–1057 (1983). The decision of the Court of Appeals in this case is in direct conflict with that holding. I would grant the petition for certiorari in order to resolve the conflict.

No. 83–1056. GENERAL MOTORS CORP. *v.* OKLAHOMA COUNTY BOARD OF EQUALIZATION ET AL. Sup. Ct. Okla. Motions of Oklahoma Industries Authority and Bunte Candies, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 678 P. 2d 233.

No. 83–1286. DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS *v.* GRAY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 721 F. 2d 586.

No. 83–5940. KING *v.* FLORIDA; and

No. 83–6184. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83–5940, 436 So. 2d 50; No. 83–6184, 437 So. 2d 133.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–5764. FLEMING *v.* STALLER ET AL., 465 U. S. 1031;

No. 83–6004. DAVIS ET AL. *v.* CENTRAL INTELLIGENCE AGENCY ET AL., 465 U. S. 1035;

No. 83–6021. ROGERS *v.* FARQUAR, 465 U. S. 1015; and

No. 83–6111. IN RE BERS, 465 U. S. 1064. Petitions for rehearing denied.

MARCH 28, 1984

Miscellaneous Order

No. A–770. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* VALTEAU ET AL. Application for stay of the order of the United States District Court for the Eastern District of Louisiana, entered March 21, 1984, pending appeal, presented to JUSTICE WHITE, and by him referred to the Court, denied.

MARCH 30, 1984

Miscellaneous Orders

No. A–740 (83–1526). KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL. D. C. N. J. Application for stay, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

JUSTICE STEVENS, concurring.

In *Karcher* v. *Daggett*, 462 U. S. 725 (1983), we held that the reapportionment plan which had been adopted by New Jersey after the 1980 census was unconstitutional. On remand, the parties, by stipulation, asked the three-judge District Court to select which of a number of proposed redistricting plans should be employed in place of the plan which had been adjudicated unconstitutional. The District Court rejected the "Senate Plan," and selected the "Forsythe Plan." The District Court chose the Forsythe Plan because it achieved lower population deviations and more compact districts than the Senate Plan. Appellants claim that the District Court was obligated to accept the Senate Plan because it most closely conformed to the State's original plan while eliminating unconstitutional population variances. They have, accordingly, filed an application for a stay of the District Court's order, as well as an appeal. Since there is currently no apportionment plan in effect in New Jersey and elections are imminent, what appellants really seek is an injunction from this Court ordering use of the Senate Plan pending disposition of the appeal.

Once a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy. *E. g.*, *Milliken* v. *Bradley*, 433 U. S. 267, 280–288 (1977). I do not believe there is a sufficient likelihood that the District Court abused that discretion by selecting the Forsythe Plan to justify the relief appellants seek. Because the Forsythe Plan contained lower population variances, it more completely redressed the constitutional violation. Nor was it an abuse of discretion to consider the fact that the Forsythe Plan created more compact districts; our previous opinion acknowledged that this is a legitimate consideration in reapportionment. See 462 U. S., at 740. We also stated that efforts to inhibit gerrymandering are a legitimate part of the reapportionment process, see *id.*, at 734–735, n. 6; here the

District Court found that the plan advocated by appellants constituted "an intentional gerrymander in favor of certain Democratic representatives." *Daggett* v. *Kimmelman*, 580 F. Supp. 1259, 1262 (NJ 1984). While a district court should not unnecessarily ignore state policies when fashioning a remedy, *White* v. *Weiser*, 412 U. S. 783, 795–797 (1973), there the District Court rejected a plan implementing "decision[s] made by the legislature in pursuit of what were deemed important state interests," *id.*, at 796, and did not explain why the plan it had rejected was "unconstitutional or even undesirable." *Id.*, at 797. Here the District Court identified legitimate considerations justifying its choice, and appellants have identified no state policy to which the District Court should have deferred that justifies the bizarre district lines in the original reapportionment plan. See 462 U. S., at 742–744, and n. 12.

Accordingly, I concur in the Court's decision to deny the application for stay.

JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

Before the Court is an application seeking to stay an order of a three-judge District Court pending final disposition of an appeal to this Court under 28 U. S. C. § 1253. The challenged order directs the State of New Jersey to conduct upcoming elections for Members of the House of Representatives pursuant to a reapportionment plan adopted by the District Court as a remedy for the constitutional violation found in New Jersey's 1982 reapportionment plan. See *Karcher* v. *Daggett*, 462 U. S. 725 (1983), aff'g 535 F. Supp. 978 (NJ 1982). Because I believe that the District Court has acted beyond the scope of its authority in correcting the relevant constitutional violation, I would grant the application for stay and remand the case to the District Court for implementation of an alternative plan. I therefore dissent.

I

Following the 1980 decennial census, the State of New Jersey was required to decrease its membership in the United States House of Representatives from 15 to 14. To satisfy this requirement, the State enacted a congressional reapportionment scheme in January 1982 (hereinafter referred to as the Feldman Plan) that eliminated one of the State's congressional districts and substantially changed the geographical boundaries used to define the re-

maining districts. Although the Feldman Plan contained the requisite 14 districts, it suffered from significant numerical inequalities in population between each of those districts. In particular, given an "ideal" district population of 526,059, the average deviation from the norm was 0.1384%, or 726 people. Moreover, the difference between the largest district and the smallest district was 3,674 people, or 0.6984% of the average district.

The Feldman Plan was challenged by several interested parties and, primarily because of these population variances, was declared unconstitutional by the District Court. *Daggett* v. *Kimmelman*, 535 F. Supp. 978 (NJ 1982). That order was stayed pending appeal to this Court, *Karcher* v. *Daggett*, 455 U. S. 1303 (1982) (BRENNAN, J., in chambers), leaving the plan in effect during the 1982 congressional elections. We noted probable jurisdiction, 457 U. S. 1131 (1982), and subsequently affirmed the decision and order of the District Court, *Karcher* v. *Daggett*, 462 U. S. 725 (1983).

In *Karcher*, this Court reaffirmed that Art. I, § 2, of the Constitution "'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Id.*, at 730 (quoting *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 531 (1969)); see *White* v. *Weiser*, 412 U. S. 783, 790 (1973). Applying that standard to the Feldman Plan, we concluded that the numerical variances described above, when combined with evidence that alternative plans available to the State contained smaller maximum deviations, demonstrated that New Jersey had not come "as nearly as practicable" to population equality among districts. 462 U. S., at 730, 739–740; *Wesberry* v. *Sanders*, 376 U. S. 1, 7–8, 18 (1964). Nor was the State able to prove that each significant variance among its districts was necessary to achieve some legitimate state objective. 462 U. S., at 740–744. We therefore concluded that the population inequalities existing under the Feldman Plan were both constitutionally significant and unjustified by legitimate state goals. Accordingly, we affirmed the District Court's holding that the plan was unconstitutional.

On remand from our decision, the three-judge District Court allowed the State until February 3, 1984, to enact another redistricting plan that would meet constitutional requirements. Although the state legislature adopted an alternative plan (Senate

Bill 3564, hereinafter referred to as the Senate Plan), it was vetoed by the Governor and had insufficient support for reenactment over that veto. Given this failure by the State's political process, the District Court convened a hearing on February 7, 1984, to choose a proper remedy for the uncorrected constitutional violation. See *Daggett* v. *Kimmelman*, 580 F. Supp. 1259 (NJ 1984). At that hearing, all parties agreed that the court should select a redistricting plan from among several alternatives offered by interested parties rather than allow the upcoming congressional elections to proceed on an at-large basis. *Id.*, at 1261. Cf. 2 U. S. C. § 2a(c).

At least six separate redistricting proposals were advanced by various parties before the District Court. Most important for present purposes were the Senate Plan and a plan submitted by various Republican congressional candidates who were the original plaintiffs in this litigation (hereinafter referred to as the Forsythe Plan).[1] In its discussion of the Senate Plan, the court first noted that its districts "are virtually identical" to those included in the unconstitutional Feldman Plan. Slight geographical changes had been made, however, resulting in an average deviation from the ideal district of less than 12 people and a maximum variation between the largest and smallest districts of only 67 people. Despite this apparent success in eliminating numerical inequalities, the court refused to accept the Senate Plan as a remedy for the constitutional violation we found last Term in *Karcher* v. *Daggett*, *supra*. In particular, the court found that the plan not only failed to "achieve as small an overall or mean deviation as other plans," but also retained the "most glaring defects in the Feldman Plan," including "an obvious absence of compactness, and an intentional gerrymander in favor of certain Democratic representatives." 580 F. Supp., at 1262.

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[1] Also before the court were two plans submitted by the Taxpayers Political Action Committee and two plans submitted by representatives of the State's executive branch. The former plans were considered only briefly by the District Court, and were rejected because their district population variances were "larger than any which would occur in the plans proposed by other parties." See *Daggett* v. *Kimmelman*, 580 F. Supp. 1259, 1262 (NJ 1984). The two plans introduced by the executive branch were considered more extensively, but they too were ultimately rejected. See *id.*, at 1263–1264. None of these plans is currently being pressed for consideration by any party before the Court.

In contrast, the Forsythe Plan produced a maximum variation of only 25 people. And, although the plan required the splitting of two municipalities, its "two great advantages . . . over any of the others, are the achievement of smaller population deviations, and the creation of more compact districts." *Id.*, at 1264. Thus, the court concluded, the Forsythe Plan "most nearly fits the appropriate criteria for a court considering a congressional reapportionment plan as a remedy for an unconstitutional reapportionment statute." *Id.*, at 1264–1265. See *infra*, this page and 915.

In sum, the District Court acknowledged that each of the submitted plans improved substantially on the numerical disparities that led us to conclude last Term that the Feldman Plan was unconstitutional. Nonetheless, the District Court chose the Forsythe Plan as the appropriate replacement for the unconstitutional Feldman Plan because it "creat[ed] more compact districts" than the Senate Plan and there was "no evidence" that "it is designed to achieve partisan advantage." 580 F. Supp., at 1264.

II

Before choosing among these alternative plans, the District Court explicitly stated the legal principles that it believed should control its remedial decision. The court first summarized the constitutional standard reaffirmed by this Court in *Karcher* v. *Daggett*, see *supra*, at 912, and then specifically noted that our opinion in *Karcher* had "declin[ed] to rely, as a constitutional violation, on the obviously partisan purposes behind the Feldman Plan." 580 F. Supp., at 1261. The court nonetheless refused to limit its analysis to the numerical inequalities that triggered our constitutional holding; instead, the court examined the alternative plans using the following principle:

> "While *Karcher* v. *Daggett* considers what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality based on the decennial census, it also provides useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process. We may take into account at least those factors which the Court has recognized as legitimate, namely: making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibit-

ing gerrymandering. With those factors in mind we turn to the several plans which have been proposed." *Id.*, at 1261–1262.

In my view, the District Court's responsibility in remedying the constitutional violation we found last Term in *Karcher* does not reach that far. Although two Justices wrote separately to note that the political gerrymandering evident from the geographical boundaries included in the Feldman Plan might be worthy of constitutional challenge, see 462 U. S., at 744 (STEVENS, J., concurring); *id.*, at 784 (POWELL, J., dissenting), the Court's finding of a constitutional violation was premised exclusively on numerical inequalities between congressional districts. Once these population disparities are eliminated, our prior cases make clear that the District Court is charged with selecting an alternative plan that accords deference to the policies and preferences that have been expressed previously by the State.

This was precisely the situation presented by *White* v. *Weiser*, 412 U. S. 783 (1973). After finding that the State's reapportionment plan was unconstitutional because of significant, yet avoidable, population variances between districts, the District Court had to choose among several remedial plans proffered by interested parties. More specifically,

> "[t]he District Court properly rejected S. B. 1 [the unconstitutional state plan], but it had before it both Plan B and Plan C, and there remains the question whether the court correctly chose to implement the latter. Plan B adhered to the basic district configurations found in S. B. 1, but adjusted the district lines, where necessary, in order to achieve maximum population equality among districts. Each district in Plan B contained generally the same counties as the equivalent district in S. B. 1. Plan C, on the other hand, was based entirely upon population considerations and made no attempt to adhere to the district configurations found in S. B. 1. . . . After deciding that S. B. 1 was unacceptable, the District Court ordered the implementation of Plan C." *Id.*, at 793–794 (footnotes omitted).

Although the appellees in *White* v. *Weiser* defended the lower court's selection of Plan C because it was "significantly more compact and contiguous than either S. B. 1 or Plan B" and because its selection was "an exercise of the remedial discretion of the District Court," *id.*, at 794, we rejected the lower court's remedial

choice and remanded for further proceedings. When fashioning a constitutional remedy in this context, we explained, the District Court must defer to any state policies that are "consistent with constitutional norms and . . . not [themselves] vulnerable to legal challenge." *Id.*, at 797.

> "From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' . . . We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment. . . . Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *Id.*, at 794–795 (citations omitted).

See also *Upham* v. *Seamon*, 456 U. S. 37, 41–43 (1982) *(per curiam)*.

Pursuant to these standards, the Court in *White* v. *Weiser* reversed the lower court's selection of a reapportionment plan, and remanded for the imposition of another plan. This was necessary because the District Court had not chosen that plan which, while eliminating the constitutional violation, would be most in accord with the State's policy preferences. See 412 U. S., at 796 (the District Court "should have implemented [the plan] which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements"); *Upham* v. *Seamon*, *supra*, at 42–43. Significantly, it was irrelevant to our analysis that the last state plan formally adopted to implement those policy judgments had itself been declared unconstitutional. See 412 U. S., at 796 ("even if the districts in [the plan chosen by

the lower court] can be called more compact, the District Court's preferences do not override whatever state goals were embodied in [the unconstitutional plan]").

Application of these principles to the situation presented by this stay application is relatively straightforward. Given the status of New Jersey's redistricting after the 1980 census, the last formal declaration of the State's policy preferences in congressional reapportionment is contained in the Feldman Plan that we declared unconstitutional last Term. Once the constitutional infirmity in that plan—the unjustified numerical inequality between congressional districts—is remedied, the District Court must choose the alternative plan that remains most faithful to those state policies. We have never concluded, nor in my view should we conclude, that the existence of noncompact or gerrymandered districts is by itself a constitutional violation.[2] Cf. *Gaffney* v. *Cummings*, 412 U. S. 735, 752–754, and n. 18 (1973). Therefore, absent unconstitutional population variances, or other findings of unconstitutionality such as discrimination on racial or religious lines, the District Court should implement the alternative plan that is most faithful to the districts included in the most recent plan enacted by the State.[3]

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[2] Thus, the factors we noted in *Karcher* v. *Daggett*, 462 U. S., at 740 ("making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives"), should be considered only to the extent that a State might rely on them to justify population variances between districts. Indeed, nothing in our opinion last Term was intended to suggest that these factors would necessarily be relevant to the constitutionality of a State's congressional reapportionment plan in the absence of numerical inequalities that themselves violate the Constitution. If only for this reason, the District Court committed legal error when it adopted these factors as its selection criteria for choosing among alternative remedial plans. Cf. *supra*, at 914–915.

[3] Hence the District Court also erred when it tried to distinguish this case from *White* v. *Weiser*, 412 U. S. 783 (1973), on the ground that "[t]he policy dispute in *White* v. *Weiser* among the competing plans was over the district court's rejection of a state policy of avoiding contests among incumbents," whereas in this case the Feldman Plan was "designed to produce contests among certain Republican incumbents." 580 F. Supp., at 1263. As I have noted, n. 2, *supra*, our finding last Term that the Feldman Plan violated Art. I, § 2, of the Constitution was premised on the population disparities found among its districts, and was not intended to suggest that we would reject any of the partisan advantages that may have resulted if the plan were implemented.

In this case, it is clear that the Senate Plan corrects the constitutional violation we found last Term by reducing the numerical inequality to a maximum deviation between districts of 67 people. Cf. *Karcher* v. *Daggett*, 462 U. S., at 739–740, n. 10; *Simon* v. *Davis*, 463 U. S. 1219 (1983), summarily aff'g *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F. Supp. 1507 (MD Pa. 1982). Moreover, the District Court found, and all parties agree, that the geographical boundaries included in the Senate Plan are closer than those of any alternative plan to the boundaries contained in the unconstitutional Feldman Plan. See 580 F. Supp., at 1262 (the Senate Plan had districts that were "virtually identical" to the districts included in the Feldman Plan); *id.*, at 1264 (districts in another plan were "considerably more compact than those in the Feldman Plan, and thus also more compact than those in [the] Senate [Plan]"). See also Letter from State Attorney General to District Court, p. 1 (Mar. 9, 1984) ("It is quite true . . . that all the parties agree that [the Senate Plan is closer to the Feldman Plan] than any of the proposed alternatives"). Indeed, the Senate Plan would require less than 10% of New Jersey's residents to change their congressional districts from the 1982 election conducted under the Feldman Plan, whereas the Forsythe Plan adopted by the District Court will require that 31.7% of the State's residents change districts. Under these circumstances, I believe the District Court erred when it adopted the Forsythe Plan under the mistaken belief that it "owe[d] no deference to an unconstitutional state statute." 580 F. Supp., at 1263.

Accordingly, I would grant the application for a stay. Moreover, given the imminence of New Jersey's primary elections, I would remand the case to the three-judge District Court for implementation of the Senate Plan, absent any finding that the Senate Plan, on its own terms, is unconstitutional.

No. A–786. O'BRYAN *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS; and

No. A–787. O'BRYAN *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Applications for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the applications.

No. A–791. O'BRYAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. Application for emergency relief, with respect to the order of the Court of Appeals for the District of Columbia Circuit, dated this day, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

APRIL 2, 1984

Affirmed on Appeal. (See Nos. 83–812 and 83–929, *infra.*)

Appeals Dismissed

No. 83–1323. COX ET AL. *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT ET AL. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. Reported below: 659 S. W. 2d 190.

No. 83–1387. HOLT *v.* COUNTY OF TIOGA, NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 60 N. Y. 2d 560, 459 N. E. 2d 195.

No. 83–1335. KONIG *v.* ABBOTT. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–1352. BISCHOFF ET AL. *v.* CITY OF AUSTIN. Appeal from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 656 S. W. 2d 209.

No. 83–6264. CHAPMAN *v.* MICHIGAN NATIONAL BANK OF DETROIT. Appeal from D. C. E. D. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 82–1787. BUCKINGHAM CORP. *v.* ODOM CORP., DBA ARIZONA DISTRIBUTING CO. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984). Reported below: 703 F. 2d 573.

No. 82–2061. NATIONAL LABOR RELATIONS BOARD *v.* ROADWAY EXPRESS, INC. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822 (1984). Reported below: 700 F. 2d 687.

Miscellaneous Orders

No. ———. CUYLER, SUPERINTENDENT, GRATERFORD PRISON *v.* SULLIVAN. Motion to direct the Clerk to file a petition for writ of certiorari with an appendix that does not comply with the Rules of this Court denied.

No. ———. WARDELL *v.* HOLLER ET AL. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court and is out of time denied.

No. ———. GAULMON *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* without filing an affidavit of indigency required by Rule 46 of the Rules of this Court denied.

No. A–709. L. C. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Dist. Ct. App. Fla., 2d Dist. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–739. PORTER *v.* UNITED STATES. Application for bail, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–766. MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE *v.* BROOKS ET AL. D. C. N. D. Miss. Application for stay pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–772 (83–6453). PARKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death set for April 13, 1984, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending final disposition of the petition for writ of certiorari.

No. A–773 (83–6125). STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death set for April 3, 1984, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending final disposition of the petition for writ of certiorari.

No. D–416. IN RE DISBARMENT OF ROUNDTREE. It is ordered that Dovey J. Roundtree, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–417. IN RE DISBARMENT OF FRIEDLAND. It is ordered that Jacob Friedland, of Jersey City, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 86, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Application of the Special Master for compensation in the amount of $64,829.50 is hereby granted. One-half of this amount shall be paid to the Special Master by the plaintiff and one-half by the defendants. [For earlier order herein, see, *e. g.*, 464 U. S. 888.]

CHIEF JUSTICE BURGER, dissenting in part.

The Special Master has applied for $64,829.50 covering fees for himself and six persons who assisted him, only two of whom were lawyers. The total amount requested can be broken down as follows:

Special Master	143.6 hrs. @ $200	$28,720.00
Mr. Witt (assoc. 4 yrs. +)	240.9 hrs. @ 125	30,112.50
Mr. Amber (1st yr. assoc.)	11.6 hrs. @ 70	812.00
Others (summer law clerks)	103.7 hrs. @ 50	5,185.00
		$64,829.50

A Special Master of this Court is a surrogate of the Court and in that sense the service performed is an important public duty of high order in much the same way as is serving in the Judiciary. I do not suggest that Special Masters should serve without compensation, as for example, Senior Federal Judges have done for a number of years in such cases, but I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this.

The parties apparently agreed with the Special Master as to a rate of $200 per hour for his services; hence no question as to his charge is before the Court. The private defendants and Mississippi have questioned the rates at which the two lawyer associates, and the four nonlawyer assistants were billed, and the total number of hours charged for their services. Mississippi, for example, stated that it has "no objection to the allowance and payment of such fees as this Honorable Court may find equitable . . . taking into consideration the three-day trial and the fact that the legal principles involved in this case have long since been settled by prior decisions of this Court."

I question:

(1) the $125-per-hour charge for assistance of a four-year associate;

(2) the $70-per-hour charge for a one-year associate; and

(3) the $50-per-hour charge for a "summer law clerk."

I assume that the latter is a law student working under the supervision of a member of the Bar. In my view, there is no basis to charge $50 per hour for a student assistant; it is obviously far more than such a student would be paid.

The associate lawyers, unburdened by the managerial or administrative aspects of group law practice, as partners in a large firm often are, should record 1,600 to 2,000 billable hours a year. At the rates charged here for the "four-year" lawyer, taking the mean figure, 1,800 hours at $125 per hour would total $225,000. There is no evidence before us to justify the rate charged. On the same basis, *i. e.*, $70 per hour, the total for the one-year associate, would be $126,000.

I am not unaware of the heavy overhead expenses of a modern law firm: office rental, support staff salaries, computer and other equipment, libraries, insurance, all burden the gross income from the firm's practice. In my view, however, even given these expenses, the rates charged for these associates, absent proof, do not appear to be reasonable.

Absent supporting evidence, there may well be questions as to the total number of hours necessarily devoted to this case by the "associates" and the summer law clerks. I do not doubt that those hours were spent, but the need for them is challenged by the States and possibly some supporting evidence is called for.

More than $5,000 is requested for 100 hours of work by four student clerks. The record shows that almost 60 hours were spent

by one law clerk researching a motion to intervene; this appears to me to be excessive. It might take a law student that long to understand fully all the problems associated with intervention, but it is not reasonable for the client to be charged that price for this sort of research which, in a sense, is education of the student involved.

The fees and expenses charged by a Special Master when allowed by this Court, represent our assurance to the parties that the charges are reasonable and proper. In light of the obvious concern that the defendants have over the fees and hours, and my own reservations about the rates charged for the hours logged by the staff assistants, I am unwilling to have the record show, *sub silentio*, that I approve all of these charges.

I emphasize that I have no question about the professional quality of the Special Master's services but absent evidence, I cannot approve rates charge for staff assistants which I consider to be excessive.

JUSTICE BLACKMUN dissents. He would allow the Special Master a total fee of $40,000.

No. 83–558. IRVING INDEPENDENT SCHOOL DISTRICT *v.* TATRO ET UX., INDIVIDUALLY, AND AS NEXT FRIENDS OF TATRO, A MINOR. C. A. 5th Cir. [Certiorari granted, 464 U. S. 1007.] Motions of New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System; Association for Persons With Severe Handicaps et al.; and New Jersey Department of the Public Advocate for leave to file briefs as *amici curiae* granted.

No. 83–710. BERKEMER, SHERIFF OF FRANKLIN COUNTY, OHIO *v.* MCCARTY. C. A. 6th Cir. [Certiorari granted, 464 U. S. 1038.] Motion of respondent for divided argument denied.

No. 83–751. SECURITIES AND EXCHANGE COMMISSION ET AL. *v.* JERRY T. O'BRIEN, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 464 U. S. 1038.] Motion of respondents for divided argument denied.

No. 83–1096. GOMEZ-HERMANOS, INC. *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Appeal from Sup. Ct. P. R. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–1526. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL. Appeal from D. C. N. J. Motion of

appellants to expedite consideration of the statement as to jurisdiction denied.

No. 83–6229. IN RE MUELLER. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 23, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of mandamus without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83–1395. IN RE RAINERI. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 83–812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.; and

No. 83–929. SMITH ET AL. *v.* JAFFREE ET AL. Appeals from C. A. 11th Cir. Probable jurisdiction noted limited to Question 1 in the jurisdictional statements, cases consolidated, and a total of one hour allotted for oral argument. The judgment with respect to the other issues presented by the appeals is affirmed. Reported below: 705 F. 2d 1526 and 713 F. 2d 614.

JUSTICE STEVENS, concurring.

In their amended complaint in this litigation, appellees sought (1) a judgment holding three statutory provisions, Ala. Code §§ 16–1-20, 16–1-20.1, 16–1-20.2 (Supp. 1983), and certain allegedly state-sanctioned, though not statutorily sanctioned, school prayer practices invalid under the Establishment Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, and (2) an injunction against the enforcement of these statutory provisions and nonstatutory practices. The District Court dismissed the amended complaint. 554 F. Supp. 1104 (SD Ala. 1983). The Court of Appeals reversed the District Court's judgment in relevant part. 705 F. 2d 1526 (CA11 1983). It held the challenged statutory provisions and nonstatutory practices unconstitutional and ordered the District Court to enter an injunction. Appellants

invoke this Court's appellate jurisdiction under 28 U. S. C. § 1254(2) regarding the Court of Appeals' judgments on the statutory provisions.

As I understand it, the order this Court enters today is a holding that Ala. Code § 16–1-20.2 (Supp. 1983) is invalid as repugnant to the Establishment Clause of the First Amendment, applicable to the States under the Fourteenth Amendment. Moreover, the Court's order also affirms the judgment of the Court of Appeals insofar as it directed the District Court to enjoin the appellants from enforcing § 16–1-20.2. The judgment of the Court of Appeals concerning the nonstatutory school prayer practices is not within the appellate jurisdiction of this Court and is challenged in a petition for a writ of certiorari in *Board of School Comm'rs of Mobile County* v. *Jaffree*, No. 83–804. The Court denies that petition, *post*, p. 926.

The Court's order noting probable jurisdiction is thus limited to the judgment of the Court of Appeals concerning the constitutionality of § 16–1-20.1. Appellants frame the constitutional questions presented by that provision as follows:

> "Whether a state statute which permits, but does not require, teachers in public schools to observe up to a minute of non-activity for meditation or silent prayer has the predominant effect of advancing students' liberty of religion and of mind rather than any effect of establishing a religion." Juris. Statement in No. 83–812, p. i.
>
> "Does a moment of silence for individual silent 'prayer or meditation' at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?" Juris. Statement in No. 83–929, p. i.

On the understanding that the Court has limited argument to the question whether § 16–1-20.1 is invalid as repugnant to the Establishment Clause, applicable to the States under the Fourteenth Amendment, I join the Court's order.

Certiorari Granted

No. 83–1007. TIFFANY FINE ARTS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 718 F. 2d 7.

No. 83–1325. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* THURSTON ET AL. C. A. 2d Cir. Certiorari granted, case consolidated with No. 83–997, *Trans World Airlines, Inc.* v. *Thurston* [certiorari granted, 465 U. S. 1065], and a total of one hour allotted for oral argument. Reported below: 713 F. 2d 940.

No. 83–1045. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* PROVENZANO. C. A. 3d Cir.; and

No. 83–5878. SHAPIRO ET AL. *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 7th Cir. Motion of petitioners in No. 83–5878 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 83–1045, 717 F. 2d 799; No. 83–5878, 721 F. 2d 215.

No. 83–6061. GARCIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 718 F. 2d 1528.

Certiorari Denied. (See also Nos. 83–1335, 83–1352, and 83–6264, *supra.*)

No. 82–1909. NATIONAL LABOR RELATIONS BOARD *v.* SCOOBA MANUFACTURING CO. C. A. 5th Cir. Certiorari denied. Reported below: 694 F. 2d 82.

No. 83–395. DENBERG ET AL. *v.* UNITED STATES RAILROAD RETIREMENT BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 696 F. 2d 1193.

No. 83–412. ROESCH, INC., ET AL. *v.* STAR COOLER CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 2d 1235.

No. 83–610. BABBITT FORD, INC. *v.* NAVAJO INDIAN TRIBE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 710 F. 2d 587.

No. 83–804. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. *v.* JAFFREE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 705 F. 2d 1526 and 713 F. 2d 614.

No. 83–915. BROOKINS ET AL. *v.* SOUTH BEND COMMUNITY SCHOOL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 710 F. 2d 394.

No. 83–943. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* UNITED STATES ET AL.;

No. 83–1030. RYDER/PIE NATIONWIDE, INC. *v.* UNITED STATES ET AL.; and

No. 83–1119. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 1369.

No. 83–946. KEENE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 838.

No. 83–954. CONFERENCE OF STATE BANK SUPERVISORS ET AL. *v.* CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 130, 715 F. 2d 604.

No. 83–1000. J. D. COURT, INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 712 F. 2d 258.

No. 83–1014. BLUMENTHAL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 114 Ill. App. 3d 1160, 459 N. E. 2d 703.

No. 83–1090. PAINTERS & DECORATORS JOINT COMMITTEE EAST BAY COUNTIES, INC. *v.* PAINTING & DECORATING CONTRACTORS ASSOCIATION OF SACRAMENTO, INC. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 1067 and 717 F. 2d 1293.

No. 83–1091. CAPACI *v.* KATZ & BESTHOFF, INC., ET AL.; and

No. 83–1094. KATZ & BESTHOFF, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 647.

No. 83–1121. GRAY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 243.

No. 83–1134. LURCH *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 719 F. 2d 333.

No. 83–1209. ANGORA ENTERPRISES, INC., ET AL. *v.* COLE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 439 So. 2d 832.

No. 83–1294. AMERICAN MOTORS CORP. ET AL. *v.* LORD, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN

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DISTRICT OF PENNSYLVANIA (two cases). C. A. 3d Cir. Certiorari denied.

No. 83–1304. PAUL *v.* HALEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1433.

No. 83–1314. GALVIN *v.* HERITAGE FIRST NATIONAL BANK OF LOCKPORT, ILLINOIS, EXECUTOR OF THE ESTATE OF GRABOW, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 913.

No. 83–1322. O'BANNON *v.* AZAR. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 435 So. 2d 1144.

No. 83–1328. MOORE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 441 So. 2d 1003.

No. 83–1331. PINE ET AL. *v.* CREDITHRIFT OF AMERICA, INC. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 281.

No. 83–1333. AMERICAN DREDGING CO. *v.* BERKLEY CURTIS BAY CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83–1344. INGRAM MANUFACTURING CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO–CLC, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 886.

No. 83–1347. UNIGARD INSURANCE CO. *v.* FORMICA CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1112.

No. 83–1348. COUNTY OF ST. LOUIS, MINNESOTA, ET AL. *v.* FEDERAL LAND BANK OF ST. PAUL. Sup. Ct. Minn. Certiorari denied. Reported below: 338 N. W. 2d 741.

No. 83–1349. MAGNISEA FISHERIES, INC. *v.* OREGON OYSTER CO. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 746.

No. 83–1359. LANDFRIED ET AL. *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. C. A. 8th Cir. Certiorari denied. Reported below: 721 F. 2d 254.

No. 83–1361. UNITED HOME RENTALS, INC., ET AL. *v.* TEXAS REAL ESTATE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 716 F. 2d 324.

No. 83–1383. KRIEG *v.* PAUL REVERE LIFE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 718 F. 2d 998.

No. 83–1462. INTERNATIONAL FIDELITY INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 110.

No. 83–1471. WIRTZ, TRUSTEE, ET AL. *v.* NORRIS. C. A. 7th Cir. Certiorari denied. Reported below: 719 F. 2d 256.

No. 83–5671. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 663.

No. 83–5761. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83–5831. SOBERAL-PEREZ ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 717 F. 2d 36.

No. 83–5870. DAWSON *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 681.

No. 83–5913. ETLIN ET AL. *v.* HORAN, COMMONWEALTH'S ATTORNEY. Sup. Ct. Va. Certiorari denied.

No. 83–5928. SEIFUDDIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 911.

No. 83–5941. COX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 719 F. 2d 285.

No. 83–5974. JONES *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 67.

No. 83–6041. RUSSOTTO *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 83–6214. BROOKS *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–6232. RUSH *v.* SPEARS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–6234. SANABRIA *v.* ZIMMERMAN, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 670.

No. 83–6242. KIZZIAR *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 83–6245. HOWARD *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 2d 993.

No. 83–6246. CANNON *v.* DEPARTMENT OF ELECTIONS FOR NEW CASTLE COUNTY ET AL. C. A. 3d Cir. Certiorari denied.

No. 83–6250. WADSWORTH *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 83–6253. STORMS *v.* COOKE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83–6257. WAITS *v.* CARTER ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–6262. BROWN *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83–6273. TARKOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1102.

No. 83–6280. FULTON *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 128.

No. 83–6290. KIRK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 723 F. 2d 1379.

No. 83–6311. APONTE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied.

No. 83–6331. MINOR *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 83–6332. SCHRAMM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1253.

No. 83–6357. WAGONER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 904.

No. 83–6359. FIELDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 549.

No. 83–6365. MCKOY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 233 U. S. App. D. C. 167, 725 F. 2d 126.

No. 83–6372. DI SILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 83–6376. LOPEZ-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 82–848. SERVICE MERCHANDISE CO., INC. *v.* AMANA REFRIGERATION, INC., ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 686 F. 2d 1190.

No. 83–431. BATTLE ET AL. *v.* LUBRIZOL CORP. ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 712 F. 2d 1238.

No. 83–1327. CHERRY ET AL. *v.* STEINER ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 716 F. 2d 687.

No. 83–1301. MILGO ELECTRONIC CORP. *v.* CODEX CORP. ET AL. C. A. 1st Cir. Motion of Jackson, Jones & Price for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 717 F. 2d 622.

No. 83–1316. FLORIDA *v.* BURWICK. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 442 So. 2d 944.

No. 83–6258. SAWYER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 442 So. 2d 1136.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 83–5549. CANTRELL *v.* FLORIDA, 464 U. S. 1047;
No. 83–5783. SIMPSON *v.* ISRINGHAUSEN, 464 U. S. 1072;
No. 83–5799. RUSSELL *v.* TEXAS, 465 U. S. 1073;
No. 83–5872. GATES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 465 U. S. 1031;
No. 83–5975. SENTI *v.* SHARMA ET AL., 465 U. S. 1034; and
No. 83–6018. WHITE *v.* TOPPITZER, 465 U. S. 1035. Petitions for rehearing denied.

APRIL 4, 1984

Dismissal Under Rule 53

No. 83–6138. FLASMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 723 F. 2d 913.

Certiorari Denied

No. 83–6532 (A–803). GOODE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application and petition. Reported below: 448 So. 2d 999.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay, grant certiorari, and vacate the death sentence in this case.

No. 83–6533 (A–804). SONNIER *v.* MAGGIO, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application and petition.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay, grant certiorari, and vacate the death sentence in this case.

APRIL 16, 1984

Affirmed on Appeal

No. 83–1422. CITY OF PLEASANTON ET AL. *v.* SMITH ET AL. Affirmed on appeal from D. C. W. D. Tex.

Appeals Dismissed

No. 83–985. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.; and SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeals from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 83–1251. NATIONAL LIBERTY LIFE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION; and

No. 83–1264. ILLINOIS COMMERCIAL MEN'S ASSN. *v.* STATE BOARD OF EQUALIZATION. Appeals from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 34 Cal. 3d 839, 671 P. 2d 349.

No. 83–1397. MINNEAPOLIS POLICE RELIEF ASSN. ET AL. *v.* SUNDQUIST, COMMISSIONER OF EMPLOYEE RELATIONS OF MINNESOTA, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 338 N. W. 2d 560.

No. 83–1472. HORNE *v.* CHAFIN ET AL. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 309 N. C. 813, 309 S. E. 2d 239.

No. 83–1371. PERATI *v.* CUTTER. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–1409. BERGEN PINES COUNTY HOSPITAL *v.* NEW JERSEY DEPARTMENT OF HUMAN SERVICES ET AL. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-1423. POINTON *v.* DONOVAN, SECRETARY OF LABOR. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 717 F. 2d 1320.

No. 83-6297. UNDERWOOD *v.* OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed. (See No. 83-181, *ante*, p. 147.)

Certiorari Dismissed

No. 83-6268. HORINE *v.* OREGON. Ct. App. Ore. Certiorari dismissed for want of a final judgment. Reported below: 64 Ore. App. 532, 669 P. 2d 797.

Miscellaneous Orders

No. ——. EUBANK *v.* LEE LUMBER CO., LTD., ET AL.;

No. ——. GIVENS ET AL. *v.* UNITED STATES RAILROAD RETIREMENT BOARD;

No. ——. LIBERTARIAN PARTY OF LOUISIANA *v.* BROWN, SECRETARY OF STATE OF LOUISIANA, ET AL.;

No. ——. M. W. ZACK METAL CO. *v.* SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, ET AL.; and

No. ——. SANDUSKY REAL ESTATE, INC., DBA REAL ESTATE ONE, ET AL. *v.* MCDONALD ET UX. Motions to direct the Clerk to file petitions for writs of certiorari that do not comply with the Rules of this Court denied.

No. ——. TALAMINI, ADMINISTRATRIX OF THE ESTATE OF TALAMINI *v.* ALLSTATE INSURANCE CO. Motion to direct the Clerk to file a jurisdictional statement that does not comply with the Rules of this Court denied.

No. ——. CUTHBERTSON ET AL. *v.* BIGGERS BROTHERS, INC. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-790. POLIN ET UX. *v.* JEWS FOR JESUS ET AL. Sup. Ct. Okla. Application for stay of mandate, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D-418. IN RE DISBARMENT OF ANDERSON. It is ordered that Floyd Witherspoon Anderson, of Washington, D. C., be sus-

pended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–2113. RICHARDSON *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, 464 U. S. 890.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 83–614. SECURITIES INDUSTRY ASSN. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. [Certiorari granted, 465 U. S. 1004.] Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted.

No. 83–1368. NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–1378. KAVANAUGH, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX, ET AL. *v.* LUCEY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

Probable Jurisdiction Noted

No. 83–1274. METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* WARD ET AL. Appeal from Sup. Ct. Ala. Probable jurisdiction noted. Reported below: 447 So. 2d 142.

No. 83–1032. FEDERAL ELECTION COMMISSION *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL.; and

No. 83–1122. DEMOCRATIC PARTY OF THE UNITED STATES ET AL. *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL. Appeals from D. C. E. D. Pa. Motion of Gulf & Great Plains Legal Foundation et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 578 F. Supp. 797.

Certiorari Granted

No. 83–1334. WINSTON, SHERIFF, ET AL. *v.* LEE. C. A. 4th Cir. Certiorari granted. Reported below: 717 F. 2d 888.

No. 83–1360. WEBB *v.* COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 715 F. 2d 254.

Certiorari Denied. (See also Nos. 83–1371, 83–1409, 83–1423, and 83–6297, *supra.*)

No. 82–837. ARTHUR YOUNG & CO. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 677 F. 2d 211.

No. 83–401. A. E. STALEY MANUFACTURING CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 711 F. 2d 780.

No. 83–625. GRIFFIN, MAYOR OF BUFFALO, ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 809.

No. 83–663. NEW YORK ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 708 F. 2d 92.

No. 83–874. POE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 713 F. 2d 579.

No. 83–960. GALAHAD *v.* WEINSHIENK, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–981. SPENCER ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 225, 712 F. 2d 539.

No. 83–984. V. N. A. OF GREATER TIFT COUNTY, INC. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 711 F. 2d 1020.

No. 83–998. FOLEY CONSTRUCTION CO. *v.* U. S. ARMY CORPS OF ENGINEERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 2d 1202.

No. 83–1040. SEABOARD SYSTEM RAILROAD, INC., ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 713 F. 2d 1243.

No. 83–1053. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 1285.

No. 83–1068. SPENCER ET AL. *v.* LOGAN. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 690.

No. 83–1145. SINGER *v.* GATES, SHERIFF-CORONER, COUNTY OF ORANGE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 733.

No. 83–1148. VITTORIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 157.

No. 83–1178. AMERICAN AIR PARCEL FORWARDING CO., LTD., ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 718 F. 2d 1546.

No. 83–1182. ENSIGN-BICKFORD CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 362, 717 F. 2d 1419.

No. 83–1184. TENNESSEE WATER QUALITY CONTROL BOARD ET AL. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 992.

No. 83–1191. GRAZIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 691.

No. 83–1198. STONE BOAT YARD *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 2d 441.

No. 83–1201. TODD SHIPYARDS CORP. ET AL. *v.* BLACK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 717 F. 2d 1280.

No. 83–1226. GARRETT *v.* UNITED STATES; and
No. 83–1227. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 716 F. 2d 257.

No. 83–1255. HACKER *v.* FIFTH THIRD BANK. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 909.

No. 83–1263. CONWAY *v.* CONSOLIDATED RAIL CORPORATION. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 221.

No. 83–1353. HARLAN *v.* FIRST INTERSTATE BANK OF UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 672 P. 2d 73.

No. 83–1364. ZILG *v.* PRENTICE-HALL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 717 F. 2d 671.

No. 83–1375. AKIN ET AL. *v.* DAHL. Sup. Ct. Tex. Certiorari denied. Reported below: 661 S. W. 2d 914.

No. 83–1379. DIAMOND M DRILLING CO. ET AL. *v.* CASON. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 423 So. 2d 108.

No. 83–1380. O'QUINN *v.* WHITNEY NATIONAL BANK OF NEW ORLEANS. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 436 So. 2d 1185.

No. 83–1390. BROWN *v.* BROWN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83–1399. PECINA *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–1408. TONER, JUDGE, JUVENILE COURT *v.* OHIO EX REL. CODY. Sup. Ct. Ohio. Certiorari denied. Reported below: 8 Ohio St. 3d 22, 456 N. E. 2d 813.

No. 83–1410. OLIVERA-CHIRINO ET AL. *v.* UNITED STATES;
No. 83–1425. MARINO *v.* UNITED STATES;
No. 83–1428. VALDES *v.* UNITED STATES; and
No. 83–1530. MULE-VASQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 311.

No. 83–1411. LUNATI ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 665 S. W. 2d 739.

No. 83–1412. CITY OF CAMBRIDGE, MASSACHUSETTS *v.* MESERVE ET AL., REORGANIZATION TRUSTEES OF THE BOSTON & MAINE CORP. C. A. 1st Cir. Certiorari denied. Reported below: 719 F. 2d 493.

No. 83–1424. BROCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1292.

No. 83–1436. WHITE *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 718 F. 2d 994.

No. 83–1483. SHEPHERD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 316.

No. 83–1458. FERREIRA ET AL. *v.* L&M PROFESSIONAL CONSULTANTS, INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 146 Cal. App. 3d 1038, 194 Cal. Rptr. 695.

No. 83–1461. GARGALLO *v.* FRANKLIN COUNTY COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 740.

No. 83–1484. BARBOA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–1487. SAWYER *v.* DUPONT GLORE FORGAN, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 686.

No. 83–1502. GRAHAM *v.* THREE OR MORE MEMBERS OF THE ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 905.

No. 83–1504. MCLEAN *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 418.

No. 83–1507. DREHER ET UX. *v.* MORRISON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 716 F. 2d 889.

No. 83–1512. IGLESIAS-URANGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 1512.

No. 83–1523. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83–1546. ANDERBERG, INDIVIDUALLY, AND AS CONSERVATRIX OF THE ESTATE OF STICHLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 976.

No. 83–1549. PARK CORP. *v.* NATIONAL SAVINGS & TRUST CO. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 1303.

No. 83–5384. BOYLAN *v.* UNITED STATES POSTAL SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 573.

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No. 83–5733. NORMAN *v.* LUCAS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 83–5856. MOWERY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 1 Ohio St. 3d 192, 438 N. E. 2d 897.

No. 83–5866. KAJFASZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 905.

No. 83–5961. BROUGHTON *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 717 F. 2d 147.

No. 83–5967. GREEN *v.* UNITED STATES;
No. 83–5972. BEY *v.* UNITED STATES; and
No. 83–6026. BEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83–5971. BOYKINS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 995.

No. 83–5982. RHODES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 710 F. 2d 1433.

No. 83–6010. EDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 917.

No. 83–6070. NICHOLS *v.* GAGNON, SUPERINTENDENT, FOX LAKE CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 710 F. 2d 1267.

No. 83–6075. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 2d 473.

No. 83–6102. GOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83–6139. JERMOSEN *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 601, 459 N. E. 2d 1291.

No. 83–6206. SOUTHWORTH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 83–6241. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 1158, 470 N. E. 2d 658.

No. 83–6247. AYERS *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 468 A. 2d 606.

No. 83–6276. NEVELS *v.* TOHEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 669.

No. 83–6279. SMITH *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 478.

No. 83–6283. COLEMAN *v.* SUSSEX COUNTY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 896.

No. 83–6284. COLEMAN *v.* MILLSBORO TOWNSHIP. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 896.

No. 83–6287. HERRINGTON *v.* MET COAL & COKE CO., INC. Cir. Ct. W. Va., Monongalia County. Certiorari denied.

No. 83–6291. SCARSELLI *v.* FIDUCIARY TRUST COMPANY OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 83–6292. ROTHSCHILD *v.* Y. M. C. A. C. A. 11th Cir. Certiorari denied.

No. 83–6293. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 905.

No. 83–6294. WEBSTER *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 743.

No. 83–6295. QUEEN *v.* EASLEY. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 676.

No. 83–6296. ROBINSON *v.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA. Sup. Ct. Tex. Certiorari denied.

No. 83–6302. TAYLOR *v.* DEVEREAUX. C. A. 11th Cir. Certiorari denied.

No. 83–6305. ZYGADLO *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1221.

No. 83-6306. WOODBERRY ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 680.

No. 83-6307. YOUNG *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 83-6309. MOORE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 820.

No. 83-6310. ROMERI *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 504 Pa. 124, 470 A. 2d 498.

No. 83-6314. BROWN *v.* CALLAHAN, ASSOCIATE COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 725 F. 2d 664.

No. 83-6316. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 724 F. 2d 517.

No. 83-6324. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 675 P. 2d 1016.

No. 83-6325. WRIGHT *v.* COOKE ET AL. C. A. 2d Cir. Certiorari denied.

No. 83-6328. NORTON *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 675 P. 2d 577.

No. 83-6329. SCEIFERS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 83-6335. LOWE ET AL. *v.* CONTINENTAL INSURANCE CO. ET AL. Sup. Ct. La. Certiorari denied. Reported below: 442 So. 2d 460.

No. 83-6338. FORT *v.* HENRY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 745.

No. 83-6349. MCGLOCKLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 F. 2d 627.

No. 83-6351. LEE *v.* WINSTON, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 717 F. 2d 888.

No. 83–6354. WRIGHT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 446 So. 2d 77.

No. 83–6368. ROTHSCHILD *v.* LOCKWOOD ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–6379. CERVENY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83–6382. PIZARRO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 671.

No. 83–6383. ATHERTON *v.* CIRCUIT COURT OF LOUDOUN COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 737.

No. 83–6385. COTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 478.

No. 83–6393. CHANYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 374.

No. 83–6394. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 904.

No. 83–6398. BIRGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 666.

No. 83–6403. MILLER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 128 Mich. App. 298, 340 N. W. 2d 858.

No. 83–6408. SINN *v.* OWENS. C. A. 7th Cir. Certiorari denied.

No. 83–6414. DIGIOVANNI *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 83–6415. CONYERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83–6416. BROADWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 402.

No. 83–6418. CRITES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1104.

No. 83–6426. YOUNG *v.* MROCK ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–6439. HAWKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 677.

No. 83–6445. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 82–716. EL PASO CO. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 682 F. 2d 530.

No. 83–977. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HUDGINS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 F. 2d 578.

No. 83–1116. HUNT ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgments of conviction. Reported below: 660 S. W. 2d 513.

No. 83–1180. MCDONALD *v.* UNITED AIR LINES, INC., ET AL.;
No. 83–1377. BARR *v.* UNITED AIR LINES, INC., ET AL.; and
No. 83–1391. UNITED AIR LINES, INC. *v.* MCDONALD ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 717 F. 2d 1140.

No. 83–1222 (A–544). CALIFORNIA *v.* WILSON. Sup. Ct. Cal. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 34 Cal. 3d 777, 670 P. 2d 325.

No. 83–1310. YOUNG ET AL. *v.* SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT ET AL. Sup. Ct. Colo. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 671 P. 2d 1294.

No. 83–1336. JONES ET AL. *v.* AMALGAMATED WARBASSE HOUSES, INC., ET AL. C. A. 2d Cir. Motion of NAACP Legal Defense and Educational Fund, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 721 F. 2d 881.

No. 83–1369. BRYSON *v.* MACFIELD TEXTURING, INC. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 722 F. 2d 737.

No. 83–1372. C & H TRANSPORTATION CO., INC. *v.* JENSEN & REYNOLDS CONSTRUCTION CO. ET AL. C. A. 5th Cir. Motion of respondent Par Industries, Inc., for damages denied. Certiorari denied. Reported below: 719 F. 2d 1267.

No. 83–6141. CHEADLE *v.* NEW MEXICO. Sup. Ct. N. M.;
No. 83–6215. GODFREY *v.* FRANCIS, WARDEN. Sup. Ct. Ga.;
No. 83–6231. MEANES *v.* TEXAS. Ct. Crim. App. Tex.;
No. 83–6281. DAUGHERTY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;
No. 83–6285. GILMORE *v.* MISSOURI. Sup. Ct. Mo.; and
No. 83–6318. FLOWERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 83–6141, 101 N. M. 282, 681 P. 2d 708; No. 83–6215, 251 Ga. 652, 308 S. E. 2d 806; No. 83–6231, 668 S. W. 2d 366; No. 83–6281, 443 So. 2d 979; No. 83–6285, 661 S. W. 2d 519; No. 83–6318, 441 So. 2d 707.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82–827. MINNESOTA *v.* MURPHY, 465 U. S. 420;
No. 82–1041. DICKMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 465 U. S. 330;
No. 82–1845. COLORADO *v.* NUNEZ, 465 U. S. 324;
No. 82–1888. VOLKSWAGENWERK A. G. *v.* FALZON ET AL., INDIVIDUALLY AND AS NEXT FRIENDS OF FALZON ET AL., 465 U. S. 1014;
No. 83–926. KLEIBOEMER ET AL. *v.* DISTRICT OF COLUMBIA, 465 U. S. 1024;
No. 83–1106. C'EST LA PLACE *v.* GRONER APARTMENTS, 465 U. S. 1015; and
No. 83–5352. MURPHY *v.* KENTUCKY, 465 U. S. 1072. Petitions for rehearing denied.

No. 83–5662. PHILLIPS *v.* KENTUCKY, 465 U. S. 1072;
No. 83–5679. HORNICK *v.* NOYES ET AL., 465 U. S. 1031;
No. 83–5772. MCQUEEN *v.* RAMSEY, WARDEN, 465 U. S. 1067;
No. 83–5883. KEENAN *v.* ELO ET AL., 465 U. S. 1032;
No. 83–5910. CAYLOR *v.* MISSISSIPPI, 465 U. S. 1032;
No. 83–6033. TUGMAN ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 465 U. S. 1036; and
No. 83–6088. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE, 465 U. S. 1037. Petitions for rehearing denied.

No. 83–6122. KHABIRI *v.* WALLACE ET AL., 465 U. S. 1082; and
No. 83–6220. DARNELL *v.* UNITED STATES, 465 U. S. 1083. Petitions for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

APRIL 23, 1984

Appeals Dismissed

No. 83–1193. FORD ET AL. *v.* DEPARTMENT OF REVENUE OF FLORIDA ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 438 So. 2d 798.

No. 83–1434. WILLIAMS ET AL. *v.* WYCHE. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 440 So. 2d 364.

No. 83–1454. CONDICT ET AL. *v.* COUNTY OF SAN LUIS OBISPO. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–1456. DUGGINS ET UX. *v.* TOWN OF WALNUT COVE. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 63 N. C. App. 684, 306 S. E. 2d 186.

No. 83–1465. FARMER *v.* BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 660 S. W. 2d 490.

No. 83–1478. JERSEY CENTRAL POWER & LIGHT CO. *v.* BOARD OF PUBLIC UTILITIES OF NEW JERSEY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of substantial federal question.

No. 83–6226. SPANN *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 279 S. C. 399, 308 S. E. 2d 518.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Certiorari Granted—Reversed and Remanded. (See No. 83–1279, *ante*, p. 380.)

Certiorari Granted—Vacated and Remanded. (See No. 83–599, *ante*, p. 378.)

Miscellaneous Orders

No. ———. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 675 *v.* ODOM ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. ———. LEIGHTON *v.* DUBOWSKI ET AL. Motion of respondent Dubowski to direct the Clerk not to file the petition for writ of certiorari denied. Request to impose sanctions denied.

No. ———. SHELBY COUNTY SHERIFF'S DEPARTMENT *v.* RUIZ. Motion to direct the Clerk to file the petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. A–757. ASHBY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–812. LAROUCHE ET AL. *v.* NORTH CAROLINA STATE BOARD OF ELECTIONS ET AL. Application to vacate the stay entered by the United States Court of Appeals for the Fourth

Circuit, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–390. IN RE DISBARMENT OF NAGEL. Disbarment entered. [For earlier order herein, see 464 U. S. 1014.]

No. D–399. IN RE DISBARMENT OF LESESNE. Thomas Petigru Lesesne III, of Charleston, S. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 21, 1984 [465 U. S. 1017], is hereby discharged.

No. D–419. IN RE DISBARMENT OF STEVENS. It is ordered that Mitchell Lee Stevens, of Lombard, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–420. IN RE DISBARMENT OF BROWNLOW. It is ordered that Jerry D. Brownlow, of Grand Prairie, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. It is ordered that Honorable Samuel J. Roberts, of Erie, Pa., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the compensation paid to his technical, stenographic, clerical, and legal assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier decision herein, see, *e. g.*, 465 U. S. 367.]

No. 82–1253. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. *v.* BARTLETT, 465 U. S. 463. Application of

Counties of Dewey et al. to direct the Clerk to file a petition for rehearing submitted by *amici curiae* denied.

No. 83–5907. ISELEY *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until May 14, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would dismiss the appeal. *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970).

No. 83–6342. IN RE FENTON. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 83–1466. SUPREME COURT OF NEW HAMPSHIRE *v.* PIPER. Appeal from C. A. 1st Cir. Probable jurisdiction noted. Reported below: 723 F. 2d 110.

Certiorari Granted

No. 83–1378. KAVANAUGH, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX, ET AL. *v.* LUCEY. C. A. 6th Cir. Certiorari granted. Reported below: 724 F. 2d 560.

No. 83–1437. MAREK ET AL. *v.* CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CHESNY. C. A. 7th Cir. Certiorari granted. Reported below: 720 F. 2d 474.

Certiorari Denied. (See also Nos. 83–1193, 83–1434, 83–1454, and 83–6226, *supra*.)

No. 83–910. GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL 249 *v.* PENNSYLVANIA TRUCK LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 665.

No. 83–1080. IOWA POWER & LIGHT CO. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 2d 1292.

No. 83–1117. LAWSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–1144. GARMON ET AL. *v.* GALVAN. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 214.

No. 83–1176. DEMAREST *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 964.

No. 83–1203. ALLISON ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 747.

No. 83–1204. CULTEE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 713 F. 2d 1455.

No. 83–1241. DAVIS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 1157.

No. 83–1258. MICHIGAN DEPARTMENT OF MENTAL HEALTH *v.* RASIMAS. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 614.

No. 83–1272. LEE *v.* CITY OF KNOXVILLE, TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 741.

No. 83–1282. SHUTTLEWORTH ET UX. *v.* CATHOLIC FAMILY SERVICES ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 439 So. 2d 1292.

No. 83–1285. FITZGERALD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 724 F. 2d 633.

No. 83–1289. HOWELL *v.* STATE BAR OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 1075.

No. 83–1342. ALLEN, DBA WILLIE F. ALLEN JANITORIAL SERVICE *v.* GREENVILLE COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 712 F. 2d 934.

No. 83–1358. DORAN ET AL. *v.* HOULE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 1182.

No. 83–1392. LOGIUDICE *v.* GEORGIA; and

No. 83–1403. KARLOVICH ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: No. 83–1392, 164 Ga. App. 709, 297 S. E. 2d 499; No. 83–1403, 165 Ga. App. 761, 302 S. E. 2d 396.

No. 83–1439. HENDERSON *v.* KATZ ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 55 Md. App. 759.

No. 83–1448. SEATRAIN LINES, INC., ET AL. *v.* CARCICH ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 95 App. Div. 2d 983, 465 N. Y. S. 2d 96.

No. 83–1453. BOARD OF REVIEW OF WILL COUNTY ET AL. *v.* BEVERLY BANK, TRUSTEE, ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 117 Ill. App. 3d 656, 453 N. E. 2d 96.

No. 83–1460. HARVEY *v.* CARPONELLI ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 117 Ill. App. 3d 448, 453 N. E. 2d 820.

No. 83–1469. SCHWARTZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 97 App. Div. 2d 379, 468 N. Y. S. 2d 290.

No. 83–1474. HARRIS-TEETER SUPER MARKETS, INC. *v.* LILLY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 326.

No. 83–1482. WEIL *v.* MCCLOUGH ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 859, 458 N. E. 2d 387.

No. 83–1514. COUCH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 438 So. 2d 769.

No. 83–1524. CORDOVA GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 16.

No. 83–1543. CUNNINGHAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 723 F. 2d 217.

No. 83–1579. FIUMARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 727 F. 2d 209.

No. 83–1586. GRINNELL MUTUAL REINSURANCE CO. *v.* EMPIRE FIRE & MARINE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 722 F. 2d 1400.

No. 83–5899. WILLIAMS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 83–6177. GUZMAN ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 403, 457 N. E. 2d 1143.

No. 83–6190. TALLEY *v.* UNITED STATES POSTAL SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 2d 505.

No. 83–6193. GANT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 467 A. 2d 968.

No. 83–6265. AARON *v.* HANRAHAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–6308. MCPEEK ET AL. *v.* GREEN ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 55 Md. App. 761.

No. 83–6315. JAMISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83–6327. MARTIN *v.* UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Sup. Ct. Pa. Certiorari denied. Reported below: 502 Pa. 282, 466 A. 2d 107.

No. 83–6333. MELCHIOR *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 486.

No. 83–6341. DELETTO *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 147 Cal. App. 3d 458, 195 Cal. Rptr. 233.

No. 83–6345. GREEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83–6355. STEVENSON *v.* ALFORD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 83–6356. RICHARDSON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 129.

No. 83–6360. GAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 895.

No. 83–6362. ROCHON *v.* MCMANUS. C. A. 5th Cir. Certiorari denied.

No. 83–6363. WALLACE *v.* SEA LAND SERVICE ET AL. C. A. 2d Cir. Certiorari denied.

No. 83–6364. JACKSON *v.* PULLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 83–6367. ROTHSCHILD *v.* CITY OF FORT LAUDERDALE. C. A. 11th Cir. Certiorari denied.

No. 83–6373. BELTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 441 So. 2d 1195.

No. 83–6374. ATTWELL ET UX. *v.* HERITAGE BANK OF MOUNT PLEASANT ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–6375. HOLSEY *v.* INMATE GRIEVANCE COMMISSION. Ct. Sp. App. Md. Certiorari denied.

No. 83–6386. ARCHIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 83–6396. WARD *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 311.

No. 83–6422. PRICE *v.* WASHINGTON DEPARTMENT OF FISHERIES. Sup. Ct. Wash. Certiorari denied. Reported below: 100 Wash. 2d 568, 674 P. 2d 659.

No. 83–6429. REGISTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 270, 457 N. E. 2d 704.

No. 83–6437. JOSEPH *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 667.

No. 83–6446. LYNK *v.* LAPORTE SUPERIOR COURT ET AL. Sup. Ct. Ind. Certiorari denied.

No. 83–6471. HAYES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 918.

No. 83–6508. BROOKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1449.

No. 83–1341. WESTERN COAL TRAFFIC LEAGUE ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 719 F. 2d 772.

No. 83–1444. MCDERMOTT INC. ET AL. *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 83–1533. TOMLIN *v.* ALABAMA. Sup. Ct. Ala.;
No. 83–5995. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 83–6334. PUTMAN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 83–6350. MCCORQUODALE *v.* BALKCOM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 83–1533, 443 So. 2d 59; No. 83–5995, 668 S. W. 2d 692; No. 83–6334, 251 Ga. 605, 308 S. E. 2d 145; No. 83–6350, 721 F. 2d 1493.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–833. TRANS-CANADA ENTERPRISES, LTD., ET AL. *v.* MUCKLESHOOT INDIAN TRIBE ET AL., 465 U. S. 1049;
No. 83–958. PORT OF TACOMA *v.* PUYALLUP INDIAN TRIBE, 465 U. S. 1049;
No. 83–994. MOLLNOW *v.* CARLTON ET AL., 465 U. S. 1100;
No. 83–5959. FAHEY *v.* CODO ET AL., 465 U. S. 1033; and
No. 83–6187. PLATEL *v.* MAGUIRE, VOORHIS & WELLS ET AL., 465 U. S. 1107. Petitions for rehearing denied.

No. 83–949. STEPNEY *v.* CONNECTICUT, 465 U. S. 1084. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

APRIL 30, 1984

Appeals Dismissed

No. 83–1089. RACK & BALL CLUB, INC. *v.* KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 2d and 11th Jud. Dists., dismissed for want of substantial federal question.

No. 83–5494. IN RE STEPHENS. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 501 Pa. 411, 461 A. 2d 1223.

No. 83–6337. CORRADO *v.* GIFFORD. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated in Part and Remanded

No. 83–1061. CATALYTIC, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 11th Cir. Certiorari granted, the judgment, insofar as it pertains to Samuel Thrach, is vacated, and the case is remanded to the Court of Appeals with directions that the case be remanded to the National Labor Relations Board for further consideration in light of *Clear Pine Mouldings, Inc.*, 268 N. L. R. B. 1044 (1984). Reported below: 714 F. 2d 158.

Miscellaneous Orders

No. A–707. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LOPEZ ET AL. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, is denied, insofar as it relates to the claims of respondent class members whose benefits were terminated on or after December 6, 1982, or who completed the administrative appeal process on or after December 6, 1982. As to all other members of the respondent class, the application for stay of judgment of the United States Court of Appeals for the Ninth Circuit is granted, pending the timely filing and final disposition of a petition for writ of certiorari.

No. A–799. GAUNCE *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 9th Cir. Application for stay of mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–396. IN RE DISBARMENT OF MCMORRIS. Disbarment entered. [For earlier order herein, see 465 U. S. 1002.]

No. D–406. IN RE DISBARMENT OF GOLDSTEIN. Disbarment entered. [For earlier order herein, see 465 U. S. 1063.]

No. D–413. IN RE DISBARMENT OF GOLDSTEIN. Charles H. Goldstein, of West Islip, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 19, 1984 [465 U. S. 1096], is hereby discharged.

No. D–421. IN RE DISBARMENT OF TAYLOR. It is ordered that Lloyd Earl Taylor, of Stapleton, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–422. IN RE DISBARMENT OF HARDEN. It is ordered that Claude McEuen Harden, Jr., of Lakeland, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–423. IN RE DISBARMENT OF HEDICKE. It is ordered that Robert Edward Hedicke, of El Paso, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–424. IN RE DISBARMENT OF STEWART. It is ordered that Bobby R. Stewart, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–425. IN RE DISBARMENT OF DENEND. It is ordered that William Leonard Denend, of Port Orchard, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–426. IN RE DISBARMENT OF PECKRON. It is ordered that Harold Stephen Peckron, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed by the parties within 30 days. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 464 U. S. 927.]

No. 83–1032. FEDERAL ELECTION COMMISSION *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL.; and

No. 83–1122. DEMOCRATIC PARTY OF THE UNITED STATES ET AL. *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, *ante*, p. 935.] Motion of appellants in No. 83–1122 for expedited briefing and oral argument denied.

No. 83–1170. UNITED STATES *v.* 50 ACRES OF LAND ET AL. C. A. 5th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–1307. UNITED STATES *v.* POWELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 83–6404. IN RE MCDONALD. Petition for writ of mandamus denied.

Certiorari Granted

No. 82–5920. SHEA *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 421 So. 2d 200.

No. 83–1013. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 83–1373. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 3d Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 719 F. 2d 624.

No. 83–1427. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WITT. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 714 F. 2d 1069 and 723 F. 2d 769.

Certiorari Denied. (See also No. 83–6337, *supra*.)

No. 82–976. CALIFORNIA *v.* HOWARD. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 82–6957. WALTON ET AL. *v.* TENNESSEE. Ct. App. Tenn. Certiorari denied.

No. 83–1047. JEFFERSON *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 152.

No. 83–1074. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* WALKER. C. A. 8th Cir. Certiorari denied. Reported below: 713 F. 2d 1378.

No. 83–1169. HOLLOMAN ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1399.

No. 83–1186. UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES ET AL. *v.* GREER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 719 F. 2d 950.

No. 83–1235. JUNE OIL & GAS, INC., ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 717 F. 2d 1323.

No. 83–1236. GRYNBERG ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 717 F. 2d 1316.

No. 83–1259. CITY OF FAIRMONT *v.* PITROLO PONTIAC-CADILLAC CO. ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 308 S. E. 2d 527.

No. 83–1284. AMERICAN HOSPITAL ASSN. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 721 F. 2d 170.

No. 83–1312. PIPER AIRCRAFT CORP. *v.* SEVEN BAR FLYING SERVICE, INC. C. A. 10th Cir. Certiorari denied. Reported below: 716 F. 2d 1322.

No. 83–1357. AMERICAN DISTRIBUTING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 2d 446.

No. 83–1446. MCMORRIS *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 35 Cal. 3d 77, 672 P. 2d 431.

No. 83–1449. DISTRICT 1199C, NATIONAL UNION OF HOSPITAL & HEALTH CARE EMPLOYEES, DIVISION OF RWDSU, AFL–CIO

v. SAUNDERS HOUSE, AKA OLD MAN'S HOME OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied. Reported below: 719 F. 2d 683.

No. 83–1464. WEST *v.* NATIONAL TRUST CO. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 441 So. 2d 637.

No. 83–1473. PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., ET AL. *v.* DEMILIA. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 97 App. Div. 2d 990, 468 N. Y. S. 2d 962.

No. 83–1475. KIRALY *v.* CLARK. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 683.

No. 83–1486. RADIOFONE, INC. *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL. Sup. Ct. La. Certiorari denied. Reported below: 440 So. 2d 694.

No. 83–1489. JOHNSON ET AL. *v.* CITY OF GLENCOE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 722 F. 2d 432.

No. 83–1491. SIKES ET AL. *v.* BOONE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 918.

No. 83–1494. MONTESANO *v.* DONREY MEDIA GROUP, DBA LAS VEGAS REVIEW JOURNAL, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 99 Nev. 644, 668 P. 2d 1081.

No. 83–1497. BARROW *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 9 Kan. App. 2d xxiv, 672 P. 2d 1107.

No. 83–1516. C & H TRANSPORTATION CO., INC. *v.* FRONTIER AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 905.

No. 83–1531. DONREY COMMUNICATIONS CO., INC., DBA DONREY OUTDOOR ADVERTISING CO. *v.* CITY OF FAYETTEVILLE, ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 280 Ark. 408, 660 S. W. 2d 900.

No. 83–1542. POTTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 20.

No. 83–1553. FLINN *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 901.

No. 83–1582. U. S. INDUSTRIES, INC. *v.* GREGG. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 1522 and 721 F. 2d 345.

No. 83–1583. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1111.

No. 83–1592. TRANOWSKI *v.* UNITED STATES SECRET SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 41, 720 F. 2d 216.

No. 83–1601. MEYER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1448.

No. 83–1609. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1101.

No. 83–1610. GROSS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 765.

No. 83–1612. GIBSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 869.

No. 83–5835. STEELE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 1190.

No. 83–6161. SALES *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83–6216. FRENCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 387.

No. 83–6227. PERKINS *v.* THOMPSON, GOVERNOR OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1112.

No. 83–6235. PARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 685.

No. 83–6238. VERNER *v.* COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 716 F. 2d 1352.

No. 83–6313. CARSWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83–6319. LIPSCOMB *v.* FIRST INDEPENDENCE NATIONAL BANK. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1109.

No. 83–6347. HAYES *v.* PEACHTREE PLAZA HOTEL ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–6366. MILLER *v.* FORESTER. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 676.

No. 83–6369. NEAL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 438 So. 2d 771.

No. 83–6371. MOORE *v.* LYNCH ET AL. C. A. 9th Cir. Certiorari denied.

No. 83–6380. THOMPSON *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 724 F. 2d 1314.

No. 83–6395. WARD *v.* GENERAL MOTORS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 749.

No. 83–6400. BROTHERS *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1108.

No. 83–6401. FERRIN *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 83–6411. JONES *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 914.

No. 83–6412. ACUFF *v.* DALLAS LEGAL SERVICES FOUNDATION, INC., ET AL. Sup. Ct. Tex. Certiorari denied.

No. 83–6460. HIDALGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83–6484. BRAGGS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 443 So. 2d 66.

No. 83–6485. ACHARYA *v.* YOUNG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 913.

No. 83–6498. FLICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 719 F. 2d 246.

No. 83–6505. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 906.

No. 83–6507. HEIMANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83–6511. BERRIO-CORDOBA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83–6520. POSTON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 727 F. 2d 734.

No. 83–6521. SOMMER *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 83–6522. TWYMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83–6525. HAFEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 21.

No. 83–6531. MCDUFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 83–122. HYDROKINETICS, INC. *v.* ALASKA MECHANICAL, INC. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 700 F. 2d 1026.

No. 83–1093. MICHIGAN *v.* PARKER. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 417 Mich. 556, 339 N. W. 2d 455.

No. 83–1421. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* THOMPSON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 714 F. 2d 1495.

No. 83–1118. ROCKEFELLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL took no part in the

consideration or decision of this petition. Reported below: 718 F. 2d 290.

No. 83–1254. VELDE ET AL. *v.* NATIONAL BLACK POLICE ASSN., INC., ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 229 U. S. App. D. C. 255, 712 F. 2d 569.

No. 83–1488. GLOBAL TERMINAL & CONTAINER SERVICES, INC. *v.* COLGATE PALMOLIVE CO. ET AL. C. A. 2d Cir. Motion of New York Shipping Association, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 724 F. 2d 313.

No. 83–1551. BROWN BEAR, INC., ET AL. *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgments of conviction.

No. 83–6230. HARRIS *v.* FLORIDA. Sup. Ct. Fla.;

No. 83–6390. JOHNSON *v.* FLORIDA. Sup. Ct. Fla.;

No. 83–6397. HYMAN *v.* SOUTH CAROLINA. Ct. Common Pleas, Charleston County, S. C.; and

No. 83–6456. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83–6230, 438 So. 2d 787; No. 83–6390, 442 So. 2d 193; No. 83–6456, 442 So. 2d 185.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–1081. FINVOLD ET AL. *v.* SAMBS ET AL., 465 U. S. 1056; and

No. 83–6188. VEREEN *v.* NEWSOME, WARDEN, ET AL., 465 U. S. 1107. Petitions for rehearing denied.

No. 83–921. COMMONWEALTH NATIONAL BANK *v.* ASHE ET AL., 465 U. S. 1024. Motion for leave to file petition for rehearing denied.

MAY 7, 1984

Dismissal Under Rule 53

No. 82–1770. NATIONAL ENQUIRER, INC. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (JONES ET AL., REAL PARTIES IN INTEREST), 462 U. S. 1144. Petition for rehearing dismissed under this Court's Rule 53.

MAY 9, 1984

Miscellaneous Order

No. A–910. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ADAMS. Application of the State of Florida to vacate the order of the United States Court of Appeals for the Eleventh Circuit, dated May 8, 1984, 734 F. 2d 511, staying the execution of sentence of death in case No. 84–5322, presented to JUSTICE POWELL, and by him referred to the Court, granted. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application to vacate the stay.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Yesterday, May 8, 1984, a majority of a panel of the Court of Appeals for the Eleventh Circuit stayed the impending execution of James Adams. The Court of Appeals concluded that Adams' petition for federal habeas corpus relief presents the same issues that are currently pending before the Court of Appeals in *Spencer* v. *Zant*, 715 F. 2d 1562, vacated for rehearing en banc, 715 F. 2d 1583 (1983), and *McCleskey* v. *Zant*, No. 84–8176 (to be argued in June 1984), and that "the en banc cases [now] pending in the Eleventh Circuit require a stay in this case." 734 F. 2d 511, 513. Adams, like the petitioners in *Spencer* and *McCleskey*, maintains that the death penalty is administered on the basis of impermissible factors, including race and geography. The panel, after full briefing and oral argument, and with the benefit of a record and complete filing of appendices, was satisfied that Adams, an indigent Negro, had raised this issue in state and federal court, but has never been afforded an evidentiary hearing or appointment of experts. The Court of Appeals was also satisfied that evidence on which Adams relies in his second petition for habeas corpus only became available to him after his first federal habeas proceedings.

After having had less than a day to consider the judgment of the Court of Appeals, this Court now vacates that judgment, thereby opening the way to Adams' execution. The haste and confusion surrounding this decision is degrading to our role as judges. We have simply not had sufficient time with which to consider responsibly the issues posed by this case. Indeed, the Court is in such a rush to put an end to this litigation that it has denied my motion to defer its action for 24 hours in order for me to write a more elaborate dissent than that which is now possible given the pressing time restraints within which I have been forced to work.

The Court's jurisprudence is increasingly being marked by an indecent desire to rush to judgment in capital cases. See, *e. g.*, *Autry* v. *McKaskle*, 465 U. S. 1085 (1984) (MARSHALL, J., dissenting) (criticizing the Court's "unseemly desire to bring litigation in a capital case to a fast and irrevocable end"); *Woodard* v. *Hutchins*, 464 U. S. 377, 383 (1984) (BRENNAN, J., dissenting) (criticizing "rush to judgment" in decision to vacate stay of execution); *ibid.* (WHITE and STEVENS, JJ., dissenting); *id.*, at 383–384 (MARSHALL, J., dissenting); *Autry* v. *Estelle*, 464 U. S. 1, 3 (1983) (STEVENS, J., dissenting) (criticizing decision to deny stay of execution pending filing and disposition of petition for certiorari); *Barefoot* v. *Estelle*, 463 U. S. 880, 914–916 (1983) (MARSHALL, J., dissenting) (criticizing suggestion that courts of appeals may adopt special, summary procedures for cases in which a stay of a death sentence has been requested).

This case, however, is especially egregious. In lifting the stay imposed by the Court of Appeals, the Court has resorted to an exercise of power that is unusual and that should only be resorted to on the rare occasion in which a lower court has flagrantly abused its discretion. Repeatedly, the Justices of this Court have recognized that the power of a single Justice or of the Court as a whole to vacate a stay entered by a lower court should be reserved for exceptional circumstances. See, *e. g.*, *Kemp* v. *Smith*, 463 U. S. 1344 (1983) (POWELL, J., in chambers); *O'Connor* v. *Board of Education*, 449 U. S. 1301, 1304 (1980) (STEVENS, J., in chambers) ("A Court of Appeals' decision to enter a stay is entitled to great deference"); *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers) (power to vacate stay issued by court of appeals should be exercised "with the greatest of caution"); R. Stern & E. Gressman, Supreme Court Practice 881–882 (5th ed. 1978) ("[T]he Court is not likely to overturn the order

of the lower court except for gross abuse of discretion"). Here, however, caution has been thrown to the winds with an impetuousness and arrogance that is truly astonishing. What appears to have been forgotten here is that we are not dealing with mere legal semantics; we are dealing with a man's life. Because the Court has utterly failed to attend to this case with the careful deliberation that it deserves and has thus committed an error with respect to process as well as result, I respectfully dissent.

MAY 14, 1984

Affirmed on Appeal

No. 83–1552. BACON ET AL. *v.* CARLIN, GOVERNOR OF KANSAS, ET AL. Affirmed on appeal from D. C. Kan. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 575 F. Supp. 763.

Appeals Dismissed

No. 83–357. CUNNINGHAM *v.* GOLDEN ET AL. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 652 S. W. 2d 910.

No. 83–1346. BAHAM ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Appeal from D. C. M. D. La. dismissed for want of jurisdiction.

No. 83–1505. CITY OF LOS ANGELES ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 147 Cal. App. 3d 952, 195 Cal. Rptr. 465.

No. 83–1518. HEILIG ET AL. *v.* MILLER. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 149 Cal. App. 3d 978, 197 Cal. Rptr. 371.

No. 83–1532. MCFATHER ET AL. *v.* COTTON STATES MUTUAL INSURANCE CO. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken

as a petition for writ of certiorari, certiorari denied. Reported below: 251 Ga. 739, 309 S. E. 2d 799.

No. 83–1562. BURG *v.* MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 35 Cal. 3d 257, 673 P. 2d 732.

No. 83–6417. HALL *v.* TAYLOR. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 35 Cal. 3d 461, 674 P. 2d 245.

Certiorari Granted—Reversed and Remanded. (See No. 83–1202, *ante*, p. 720; and No. 83–1338, *ante*, p. 727.)

Miscellaneous Orders

No. ——. PROFESSIONAL POSITIONERS, INC., ET AL. *v.* T. P. LABORATORIES, INC. Motion to direct the Clerk to file a petition for writ of certiorari with an appendix that does not comply with the Rules of this Court denied. JUSTICE O'CONNOR would grant the motion.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Rule 33.1(d) generally requires that documents filed with this Court be reproduced on paper 6⅛ by 9¼ inches in size, with margins of ¾ inch, to be bound along the left margin "so as to make an easily opened volume, and no part of the text shall be obscured by the binding." It provides, however, that "appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents."

Certain patent documents in this case could not be reproduced on paper 6⅛ by 9¼ inches in size without violating the other requirements of the Rule. Hence, it seems, at least, that petitioner Professional Positioners, Inc., may reproduce those documents on larger paper. Petitioner now moves that "it be permitted to file a single appendix containing both the patent in suit and the decisions of the two courts below rather than preparing separate appendices," arguing that it would be "more convenient for the court to have a single appendix" and would be "unduly clumsy and ex-

pensive to prepare a separate appendix solely for the opinions below of a size different than the appendix containing the patent."

No set of procedural rules can anticipate every problem that may arise in litigation. Courts must therefore retain the power to grant exceptions when a litigant's request fully accommodates the court's needs and when strict compliance would be wasteful. This movant's request to submit a single appendix on the same size paper as the patent at issue is perfectly reasonable and should be granted.

Presumably the Court has denied the motion because it believes the value of the time saved by simply requiring literal compliance with all of its Rules in all cases will outweigh the cost of occasional inconvenience and undue expense. My experience has persuaded me, however, that motions of this kind can be fairly processed so rapidly that the cost of exercising judgment and common sense will not only be trivial, but will actually produce a net savings to the Court in the long run. Surely less time would be spent than the Court has recently devoted to a careful scrutiny of every debatable motion to proceed *in forma pauperis*. See generally *Brown* v. *Herald Co.*, 464 U. S. 928, 931 (1983) (STEVENS, J., dissenting). I would grant petitioner's sensible motion.

I respectfully dissent.

No. A–842. WILSON ET AL. *v.* COLORADO. Ct. App. Colo. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–398. IN RE DISBARMENT OF ARMENTROUT. Disbarment entered. [For earlier order herein, see 465 U. S. 1017.]

No. D–400. IN RE DISBARMENT OF PRACHT. Andrew White Pracht, of Eglin, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 21, 1984 [465 U. S. 1017], is hereby discharged.

No. D–401. IN RE DISBARMENT OF BALLARD. Disbarment entered. [For earlier order herein, see 465 U. S. 1017.]

No. D–405. IN RE DISBARMENT OF GETTINGER. Disbarment entered. [For earlier order herein, see 465 U. S. 1018.]

No. D–407. IN RE DISBARMENT OF CATES. Disbarment entered. [For earlier order herein, see 465 U. S. 1063.]

No. D–408. IN RE DISBARMENT OF LEVENSTEIN. Disbarment entered. [For earlier order herein, see 465 U. S. 1076.]

No. D–428. IN RE DISBARMENT OF QUELLO. It is ordered that Allan T. Quello, of Hopkins, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–429. IN RE DISBARMENT OF COOPER. It is ordered that Saul J. Cooper, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–431. IN RE DISBARMENT OF WATSON. It is ordered that Norma Mims Watson, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 86, Orig. LOUISIANA *v.* MISSISSIPPI ET AL., *ante*, p. 96. Motion of defendant Avery B. Dille, Jr., for clarification of opinion denied.

No. 83–1545. WESTERN AIR LINES, INC. *v.* CRISWELL ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–6323. JONES *v.* EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 4, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83–6451. OMERNICK *v.* RICHARDS ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 4, 1984, within which to

pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83–6436. IN RE TEPP;
No. 83–6509. IN RE SAYLES; and
No. 83–6535. IN RE JOHNSON. Petitions for writs of mandamus denied.

Certiorari Granted

No. 83–1084. VISTA RESOURCES, INC., ET AL. *v.* SEAGRAVE CORP. C. A. 2d Cir. Certiorari granted. Reported below: 696 F. 2d 227 and 710 F. 2d 95.

No. 83–1416. NATIONAL LABOR RELATIONS BOARD *v.* ACTION AUTOMOTIVE, INC. C. A. 6th Cir. Certiorari granted. Reported below: 717 F. 2d 1033.

Certiorari Denied. (See also Nos. 83–1505, 83–1518, 83–1532, and 83–1562, *supra*.)

No. 83–502. FIELD COMMUNICATIONS CORP. ET AL. *v.* BRAIG, JUDGE, COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY. Super. Ct. Pa. Certiorari denied. Reported below: 310 Pa. Super. 569, 456 A. 2d 1366.

No. 83–619. GRAVES *v.* LEXINGTON HERALD-LEADER CO. Sup. Ct. Ky. Certiorari denied.

No. 83–976. HOSPITAL SERVICE ASSOCIATION OF NEW ORLEANS, INC. *v.* ST. BERNARD GENERAL HOSPITAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 978.

No. 83–1126. MAIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 2d 978.

No. 83–1129. CIAMMITTI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 927.

No. 83–1162. PICCOLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 1234.

No. 83–1164. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 F. 2d 553.

No. 83–1216. JONES ET AL. *v.* BERRY, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 443.

No. 83–1219. MACON TELEGRAPH PUBLISHING CO. *v.* ELLIOTT. Sup. Ct. Ga. Certiorari denied. Reported below: 251 Ga. 544, 309 S. E. 2d 142.

No. 83–1220. FARRAH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 715 F. 2d 1097.

No. 83–1231. TESLOVICH *v.* UNITED STATES; and
No. 83–1291. SOLOMON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 83–1231, 725 F. 2d 670; No. 83–1291, 725 F. 2d 671.

No. 83–1232. MURRAY *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 83–1237. SANCHEZ-MARTINEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 72.

No. 83–1242. SUN MYUNG MOON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 1210.

No. 83–1298. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 1341.

No. 83–1299. KAHALEWAI ET AL. *v.* RODRIGUES (two cases). Sup. Ct. Haw. Certiorari denied. Reported below: 66 Haw. 675 (first case); 66 Haw. 681 (second case).

No. 83–1302. NAVA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied.

No. 83–1308. STRICK CORP. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 1194.

No. 83–1311. OKLAHOMA EX REL. DEPARTMENT OF HUMAN SERVICES *v.* WEINBERGER, SECRETARY OF DEFENSE. C. A. 10th Cir. Certiorari denied.

No. 83–1315. RIVERBEND FARMS, INC. *v.* AGRICULTURAL LABOR RELATIONS BOARD ET AL.; and

No. 83–1332. RIVCOM CORP. *v.* AGRICULTURAL LABOR RELATIONS BOARD ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 3d 743, 670 P. 2d 305.

No. 83–1326. WISSLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 1050.

No. 83–1337. HERO LANDS CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 727 F. 2d 1118.

No. 83–1339. EISENBERG *v.* UNITED STATES; and

No. 83–1340. DORISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 901.

No. 83–1381. FEINSTEIN ET AL. *v.* NETTLESHIP CO. OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 928.

No. 83–1396. EASTERDAY *v.* COYER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 720 F. 2d 626.

No. 83–1401. FELTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 66.

No. 83–1405. WEBB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 917.

No. 83–1418. CITY OF LITTLE ROCK ET AL. *v.* GILBERT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 722 F. 2d 1390.

No. 83–1480. GEOSEARCH, INC., ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 721 F. 2d 694.

No. 83–1511. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 470 A. 2d 281.

No. 83–1521. WEISS *v.* EMPLOYER-SHEET METAL WORKERS LOCAL 544 PENSION TRUST PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 302.

No. 83–1525. CARROLL *v.* SCOTT, SHERIFF OF DE KALB COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 687.

No. 83–1529. ROBINSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 721.

No. 83–1541. PORTER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 65 N. C. App. 13, 308 S. E. 2d 767.

No. 83–1547. NOVEL *v.* LOUISIANA EXPOSITION ET AL. C. A. 5th Cir. Certiorari denied.

No. 83–1548. KUSTINA *v.* CITY OF SEATTLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 691.

No. 83–1550. LITTON SYSTEMS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 264.

No. 83–1556. ADAMS *v.* PROVIDENCE & WORCESTER CO. C. A. 1st Cir. Certiorari denied. Reported below: 721 F. 2d 870.

No. 83–1557. PACIFIC INTERMOUNTAIN EXPRESS CO. *v.* JOHNSON ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 662 S. W. 2d 237.

No. 83–1568. COIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1120.

No. 83–1570. FOSTER ET AL. *v.* MILLER, CHAIRMAN, FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 263, 721 F. 2d 1424.

No. 83–1571. RADIGAN *v.* SUPREME COURT OF KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 660 S. W. 2d 673.

No. 83–1574. CITY OF PERRYTON, TEXAS *v.* JACKS ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 128.

No. 83–1575. AYOOB ET AL. *v.* MORRISON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83–1580. CITRON ET AL. *v.* CITRON. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 14.

No. 83–1585. WOLTERS VILLAGE, LTD. *v.* VILLAGE PROPERTIES, LTD. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 441.

No. 83–1588. CRAMER *v.* STATE BAR OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 908.

No. 83–1595. VALERIANO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 191 Conn. 659, 468 A. 2d 936.

No. 83–1603. BURNWORTH *v.* BURNWORTH. Ct. App. Colo. Certiorari denied.

No. 83–1639. LAFONTAINE *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83–1641. MULLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83–1644. MORRIS *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 298 Md. 299, 469 A. 2d 853.

No. 83–1665. BORRELL *v.* UNITED STATES INFORMATION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 263, 721 F. 2d 1424.

No. 83–1694. PRIMROSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 1484.

No. 83–1701. BOSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 1511.

No. 83–5869. CROWDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 719 F. 2d 166.

No. 83–6005. KINDEM *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 338 N. W. 2d 9.

No. 83–6024. SANTANA ET AL. *v.* COLLAZO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 714 F. 2d 1172.

No. 83–6057. MOCK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83–6066. GLOVER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 783, 457 N. E. 2d 783.

No. 83–6130. MORENO *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 171.

No. 83–6142. HUFFMAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1292.

No. 83–6169. FERGUSON *v.* MCCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 915.

No. 83–6181. HILL *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 816.

No. 83–6218. HOCKENBURY *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 155.

No. 83–6233. SHEEHAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 713 F. 2d 1097.

No. 83–6288. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83–6348. SHAH *v.* HUTTO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 1167.

No. 83–6377. ANDREWS *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 900.

No. 83–6420. DOUGLAS *v.* ROBB ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 674.

No. 83–6423. JAMESON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1125.

No. 83–6428. SCARSELLI *v.* NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 83–6431. ROGERS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 83–6432. SMITH *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1273.

No. 83–6433. WILKINS *v.* LYLES, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 678.

No. 83–6434. SILVER *v.* MOHASCO CORP. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1435.

No. 83–6441. LOGAN *v.* CLERK, SEDGWICK COUNTY CIRCUIT COURT, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83–6442. JOHNSON *v.* CONSOLIDATED FREIGHTWAYS, INC. C. A. 7th Cir. Certiorari denied.

No. 83–6444. JONES *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 159.

No. 83–6448. HOLMAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 443 So. 2d 67.

No. 83–6450. SCHMIDT *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 83–6461. CASTON *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83–6462. WILSON *v.* MORRIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 591.

No. 83–6464. MALDONADO *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 676.

No. 83–6465. KNIGHT *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 83–6472. SHAW *v.* NEECE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 2d 947.

No. 83–6477. DIAZ *v.* MARTIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 1372.

No. 83–6478. FULLARD *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 977.

No. 83–6489. BLAIR *v.* PENNSYLVANIA ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 78 Pa. Commw. 41, 467 A. 2d 71.

No. 83–6491. CLINTON *v.* ROBLE. C. A. 3d Cir. Certiorari denied.

No. 83–6495. PETTY *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83–6499. WOODS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 319 Pa. Super. 602, 466 A. 2d 709.

No. 83–6517. PUCHALSKI *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83–6530. BONNER *v.* PHILADELPHIA INTERNATIONAL RECORDS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 764.

No. 83–6534. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 83–6553. CASTEEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1445.

No. 83–6563. MCDONALD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 1288.

No. 83–6566. GOMEZ-SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 649.

No. 83–6579. CRISCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1228.

No. 83–6582. FLOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83–6588. ROMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 846.

No. 82–859. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* CLARK. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 676 F. 2d 1099.

No. 83–1519. FLORIDA *v.* DRAKE. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 441 So. 2d 1079.

No. 83–1187. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW *v.* ITT LIGHTING FIXTURES, INC., DIVISION OF ITT CORP., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 40 and 718 F. 2d 201.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

A majority of the employees at two facilities operated by respondent ITT Lighting Fixtures, Inc., chose petitioner International Union as their bargaining representative in an election conducted under the auspices of the National Labor Relations Board in February 1979. ITT contested the election results, challenging the ballots cast by a number of group leaders on the ground that these employees were supervisors and asserting that they had actively favored the union during the election campaign. The Board held that some of the group leaders were supervisors ineligible to vote but concluded that their pro-union activities did not impermissibly interfere with other employees' free choice because they were only minor supervisors with no substantial authority to affect the employment status of other employees. 249 N. L. R. B. 441 (1980). The International Union was certified as bargaining representative, and, when ITT refused to bargain, the NLRB found that the company had committed an unfair labor practice. 252 N. L. R. B. 328 (1980).

The Court of Appeals for the Second Circuit refused to enforce the NLRB's bargaining order, taking the view that the Board had failed to make sufficient findings concerning the precise supervisory authority of the group leaders and to articulate sufficiently its reasons for concluding that the group leaders' pro-union activities did not impair other employees' free choice. 658 F. 2d 934 (1981). On remand, the NLRB made new findings about each of the group leaders, reaffirmed its certification of the International Union, and ordered ITT to bargain. 265 N. L. R. B. 1480 (1982).

The Court of Appeals again refused enforcement, vacated the NLRB's order, and set aside the election. 712 F. 2d 40 (1983). It concluded that the Board had given insufficient weight to group leaders' power to reward employees in determining whether the

group leaders were major supervisors whose involvement in the union campaign was coercive. Although the Board had concluded that the group leaders lacked the power to reward employees, the Court of Appeals examined the record and concluded that five group leaders possessed more than minimal power to reward employees and that "51 employees could possibly have been influenced by the pro-union activity" of these supervisors. *Id.*, at 45. Since the outcome of the election depended on 12 votes, the court concluded that a new election should be held.

In its submission to this Court, the NLRB has taken the position that the Court of Appeals erred in rejecting its finding that ITT's group leaders possessed insufficient authority over other employees to make their pro-union activities coercive but that review is unnecessary in light of the fact-bound nature of the Court of Appeals' decision. In my view, however, the case warrants this Court's attention. Not only did the Court of Appeals select isolated language from the Board's Supplemental Decision and Order in concluding that the Board had failed to consider the group leaders' power to reward employees as evidence of major supervisory power, but also it appears to have enunciated a standard against which pro-union supervisory conduct is to be judged that differs substantially from the standard adopted by its sister Circuits.

There is no doubt that the participation of supervisors in union elections may in some circumstances so undermine employees' freedom of choice as to warrant setting aside the election. In rejecting ITT's challenge to the election, the Board concluded both that the supervisors who expressed their support for the International Union lacked substantial authority over other employees and that the supervisors' pro-union activities were not such as to give rise to a fear of possible retribution. Although the Court of Appeals recognized the need to consider both the degree of supervisory authority and the extent, nature, and openness of pro-union activity, *e. g.*, 658 F. 2d, at 937, it concentrated its analysis almost exclusively on the former. After concluding that some of the group leaders possessed major supervisory authority, the Second Circuit held, without considering the specific conduct at issue, that the group leaders' activity "could possibly have . . . influenced" some employees. Other Circuits that have addressed this question have concluded that "without evidence of any threats, express or implied, [the fact that certain supervisors favor a union] does

not compel a finding of coercion." *Fall River Savings Bank* v. *NLRB*, 649 F. 2d 50, 57 (CA1 1981). See *NLRB* v. *Manufacturer's Packaging Co.*, 645 F. 2d 223, 226 (CA4 1981); *NLRB* v. *San Antonio Portland Cement Co.*, 611 F. 2d 1148, 1151 (CA5 1980); *Global Marine Development of California, Inc.* v. *NLRB*, 528 F. 2d 92, 95 (CA9 1975), cert. denied, 429 U. S. 821 (1976); *Worley Mills, Inc.* v. *NLRB*, 685 F. 2d 362, 365 (CA10 1982). The First Circuit, in fact, appears to have recognized that the Second Circuit's standard differs from its own. *NLRB* v. *Northeastern University*, 707 F. 2d 15, 18 (1983). Although the Court of Appeals disavowed this intention, 658 F. 2d, at 937, it is difficult to escape the conclusion that the rule it announced comes close to a *per se* rule against supervisory involvement in union elections. Perhaps it is correct, but its approach seems at odds with that of the Board and other Circuits. I would grant certiorari.

Accordingly, I dissent.

No. 83–1290. MOBIL OIL CORP. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 716 F. 2d 1187.

No. 83–6321. KING *v.* WILLIAMS INDUSTRIES, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 724 F. 2d 240.

No. 83–1297. UNITED STATES *v.* DAHLSTROM ET AL. C. A. 9th Cir. Motions of respondents Gaze Durst and Hiram E. Conley for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 713 F. 2d 1423.

No. 83–1544. SIEBERT ET AL. *v.* CONSERVATIVE PARTY OF NEW YORK STATE ET AL. C. A. 2d Cir. Motion of Center for Responsive Politics for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 724 F. 2d 334.

No. 83–1561. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF VAN HORNE ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 720 F. 2d 1114.

No. 83–1567. CROSS *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the

consideration or decision of this petition. Reported below: 721 F. 2d 1152.

No. 83–5785. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 83–5966. DIXON *v.* ILLINOIS. App. Ct. Ill., 1st Dist.; and
No. 83–6199. YATES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 83–5785, 97 Ill. 2d 252, 454 N. E. 2d 220; No. 83–5966, 105 Ill. App. 3d 340, 434 N. E. 2d 369; No. 83–6199, 98 Ill. 2d 502, 456 N. E. 2d 1369.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgments of the Supreme Court of Illinois and the Appellate Court of Illinois insofar as they left undisturbed the death sentences imposed in these three cases. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that capital punishment were constitutional under certain circumstances, I would vote to grant these petitions because they present a substantial constitutional challenge to the Illinois state's attorneys' practice of using peremptory challenges to exclude Negro jurors from participating in capital cases.

Hernando Williams, Wendell Dixon, and Lonnie Yates are Negroes. In unrelated indictments, the people of Illinois charged each of these men with serious felonies, punishable by death under Illinois law. Each was tried by jury, and each now claims that the prosecution violated the Federal Constitution by using peremptory challenges to remove Negroes from the jury venire.[1] In petitioner Dixon's case, 20% of the jury venire were Negroes. The prosecution used five of seven peremptory challenges to exclude the Negro members from the venire. An all-white jury then convicted Dixon and sentenced him to death. In petitioner Williams' case, 22% of the venire were Negroes. The prosecution used 11 of its 20 peremptory challenges to exclude Negroes, and an all-white jury sentenced Williams to death. In petitioner Yates' case, the record does not indicate what percentage of the

[1] Petitioners Dixon and Yates were both convicted and sentenced by a jury. Petitioner Williams pleaded guilty, and a jury heard only the sentencing phase of his trial.

venire were Negroes, but the record does show that the State used 13 of 16 peremptory challenges to remove Negroes from the venire. The jury that convicted Yates and sentenced him to death included a single Negro.

The claim raised in these petitions is distressingly familiar. Whenever a Negro defendant is charged with a capital offense, there is a substantial chance that the prosecution will employ its peremptory challenges to remove Negroes and other minorities from the jury panel. See *Gilliard* v. *Mississippi*, 464 U. S. 867, 867–868, and n. 3 (1983) (MARSHALL, J., dissenting) (listing cases in 19 different jurisdictions raising the issue since 1979). Illinois provides a striking, but by no means isolated, illustration of the dimensions of the problem. Since 1959, the Supreme Court of Illinois has reviewed at least 33 cases in which criminal defendants have alleged prosecutorial misuse of peremptory challenges to exclude Negro jurors. See *People* v. *Payne*, 99 Ill. 2d 135, 152–153, 457 N. E. 2d 1202, 1210–1211 (1983) (Simon, J., dissenting) (list of cases). Petitioners in these three cases stand at the end of a long line of Negro criminal defendants who claim that the State of Illinois has denied them trial by a fair cross-section of the community.

The intentional exclusion of Negro jurors is particularly pronounced in capital cases in Illinois. Since the enactment of the latest Illinois Death Act, 29 juries have been empaneled to sentence Negro defendants in capital cases. Nineteen of these juries were all-white, and five had only one Negro juror. Illinois Coalition Against the Death Penalty, Death Sentences in Illinois (July 31, 1983). It is simply inconceivable that the racial composition of these juries was the result of statistical anomaly. According to the most recent census figures, 14.65% of the Illinois population is Negro.[2] If the jury-selection process in Illinois were completely race-blind, roughly 17% of all juries would be expected to have one or no Negro jurors. In fact, more than 80% of the Illinois sentencing juries have had less than two Negro members when the defendant was a Negro.

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[2] Bureau of Census, County and City Data Book 130 (1983). The 14.65% figure is actually conservative since more than half of the capital cases involving Negro defendants were tried in Cook County, which is more than 25% Negro. *Ibid.*

In reviewing petitioner Williams' appeal, the Illinois Supreme Court reviewed these jury-composition statistics prepared by the Illinois Coalition. 97 Ill. 2d 252, 273, 454 N. E. 2d 220, 230 (1983). Despite the clear import of the figures, the Illinois Supreme Court concluded that the statistics were insufficient to establish prosecutorial misconduct under *Swain* v. *Alabama*, 380 U. S. 202 (1965).[3] Since in Illinois *Swain* presents the only limitations on a prosecutor's use of peremptory challenges, the Illinois Supreme Court concluded that the procedure used to select petitioner Williams' jury, like the procedures used in the trials of petitioners Yates and Dixon, was without constitutional defect.

A majority of this Court has already recognized that the exclusion of minority jurors through peremptory challenges is a significant constitutional issue this Court will some day have to address. *McCray* v. *New York*, 461 U. S. 961, 961–962 (1983) (opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.); *id.*, at 966–967 (MARSHALL, J., joined by BRENNAN, J., dissenting). As the years pass, it becomes increasingly clear that the problem will not be solved until this Court intervenes. See *Gilliard* v. *Mississippi*, *supra*, at 873. Over the last 12 months, I have twice urged the Court either to reconsider our decision in *Swain* v. *Alabama*, *supra*, or to address the distinct question whether the Sixth and Fourteenth Amendments prohibit the States from excluding potential jurors solely on the basis of race. See *McCray* v. *New York*, *supra*, at 963 (MARSHALL, J., dissenting); *Gilliard* v. *Mississippi*, *supra*. These petitions present the Court with three more opportunities to protect criminal defendants against jury-selection procedures that are clearly racially discriminatory. Again today, I urge my colleagues to grant

[3] The Illinois Supreme Court was critical of the study prepared by the Illinois Coalition Against the Death Penalty and presented by petitioner Williams during his appeal because the study did not indicate how many times defense counsel and the prosecution employed peremptory challenges to exclude minorities in individual cases covered by the study. 97 Ill. 2d, at 273, 454 N. E. 2d, at 230. This criticism reflects the practical impossibility of obtaining relief under *Swain*, which offers defendants protection only if the prosecutor uses peremptory challenges to exclude Negro jurors in "case after case." Not only does the *Swain* standard make a defendant's constitutional rights contingent upon the facts of previous cases, see *McCray* v. *New York*, 461 U. S. 961, 964–965 (1983) (MARSHALL, J., dissenting), but a defendant's opportunity to vindicate those rights depends on other defendants' building adequate records in previous cases.

certiorari on what I believe to be one of the gravest and most persistent problems facing the American judiciary today.

I dissent from the Court's refusal to confront this issue.

No. 83–5808. PORTER *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 944.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case presents a recurring question concerning the standard for determining when a trial judge has a constitutional obligation to order a psychiatric examination to determine a defendant's competency to stand trial. Especially because the correct answer to that question determines whether petitioner lives or dies, I would grant the petition.[1]

In 1976, petitioner, Henry Martinez Porter, was tried in Texas for the murder of a policeman. He was convicted and sentenced to death. However, the Texas Court of Criminal Appeals overturned his conviction on the ground that petitioner's constitutional right to confront witnesses against him had been violated by the introduction into evidence of materials from a file pertaining to petitioner's conduct while on federal parole during 1973 and 1974. *Porter* v. *State*, 578 S. W. 2d 742 (1979). Among those materials were various reports that cast doubt on petitioner's sanity and capacity to understand legal proceedings. For example, the director of a drug abuse treatment center described petitioner's debilitating and apparently incurable heroin addiction. The director went on to cite petitioner's "'serious mental and emotional handicaps,'" concluding that petitioner's "'[r]ehabilitative rating is very poor.'" *Id.*, at 745. Another report quoted unnamed psychologists to the effect that petitioner had "'a psychopathic personality'" and had manifested "'paranoid schizophrenic behavior.'" *Id.*, at 744.

Petitioner was retried before the same judge who had presided over his first trial. After the jury had been selected but before it was empaneled, the prosecutor for the first time discovered a presentence report, prepared in 1959, that described a psychiatric

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[1] Adhering to my view that the death penalty is unconstitutional in all circumstances, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition and vacate the sentence even if petitioner had not presented the substantial claim discussed in the text.

episode in petitioner's past. The report revealed that, while incarcerated on a robbery charge, petitioner was sent from a reformatory to a psychiatric hospital, "because he had hallucinations of seeing his father and speaking to him." After being held at the hospital for a month, petitioner escaped.

After receiving this report from the prosecutor, petitioner's counsel informed the trial judge that he was concerned about the bearing of the newly revealed evidence on petitioner's competency to stand trial and requested the judge to order a pyschiatric examination of petitioner. Counsel also asked for a ruling that the results of such an examination would be admissible only for the purpose of assessing petitioner's competency, and would be excluded from the penalty phase of the trial. The prosecutor acceded to the request for an exam but objected to the proposed limitation on the admissibility of the results thereof. The trial judge ruled with the prosecutor on this issue, indicating that he would grant the request for a psychiatric exam only if the material disclosed thereby were admitted into the record and could be used by either side for any purpose. In the face of this ruling, defense counsel withdrew his request for a competency exam.

At the conclusion of the second trial, petitioner was once again convicted and sentenced to death. The Texas Court of Criminal Appeals affirmed, *Porter* v. *State*, 623 S. W. 2d 374 (1981), and this Court denied certiorari, 456 U. S. 965 (1982).

After exhausting his state remedies, petitioner brought this suit in Federal District Court, seeking a writ of habeas corpus on the ground, *inter alia*, that the trial judge's ruling on his request for a psychiatric examination violated the Due Process Clause. The District Court denied relief without oral argument or an evidentiary hearing. No. C–82–159 (SD Tex., Oct. 28, 1982). The Court of Appeals for the Fifth Circuit affirmed. *Porter* v. *Estelle*, 709 F. 2d 944 (1983).

As the Court of Appeals acknowledged, if petitioner's competency was questionable, the trial judge erred in refusing to order a psychiatric examination unless its results could be admitted by the prosecution in the penalty phase of the trial. See *id.*, at 951. It is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant's ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency, even if the defendant does not request such an exam. *Drope* v. *Missouri*,

420 U. S. 162 (1975); *Pate* v. *Robinson*, 383 U. S. 375 (1966). It is equally clear that statements made by a defendant in the course of a court-ordered competency exam cannot be used against him in either the liability phase or the penalty phase of his trial unless the defendant makes an intelligent and voluntary waiver of his privilege against self-incrimination. *Estelle* v. *Smith*, 451 U. S. 454 (1981). A trial judge may not put a defendant to the choice of forgoing either his right to a competency exam or his right to limit the admissibility of statements he makes during such an exam. Cf. *Simmons* v. *United States*, 390 U. S. 377, 393–394 (1968).

Nevertheless, the Court of Appeals upheld the denial of habeas relief in this case on the ground that the evidence available to the trial judge at the time he made his ruling was insufficient to cast doubt on petitioner's competency. The Court of Appeals made two points in support of this conclusion. First, the trial judge had had an opportunity to observe petitioner in the course of his first trial and in the preliminary stages of the second trial, and petitioner had participated competently in those proceedings. Second, the psychiatric episode that had recently come to the parties' attention had occurred when petitioner was 17, 20 years before the time of the second trial, and thus had little probative value.

In my view, the factors relied upon by the Court of Appeals are insufficient to support its conclusion. In *Drope* v. *Missouri*, *supra*, at 180, we described as follows the standard to be applied by trial judges in situations of this sort:

> "The import of our decision in *Pate* v. *Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated."

At the time he was called upon to assess defense counsel's motion, the trial judge in this case was aware of several reports describing petitioner's "paranoid" and "schizophrenic" behavior.

The judge was also aware that petitioner had a serious and seemingly ineradicable heroin addiction. Petitioner's probation records contained reports from psychiatrists regarding petitioner's "psychopathic personality." Finally, the judge had just been informed that petitioner had been confined in a mental hospital at the age of 17 because of hallucinations. In sum, a substantial body of both medical evidence and evidence pertaining to petitioner's behavior cast doubt upon petitioner's ability to comprehend the proceedings against him.[2] Surely the Court of Appeals erred in concluding that the cumulation of these data was insufficient to entitle petitioner to a competency exam.

The foregoing conclusion is reinforced by the fact that both the prosecutor and the state trial judge agreed that petitioner should have been given an examination. In response to defense counsel's motion, the prosecutor conceded that, "the way the case law is," both the trial court and defense counsel had an obligation to have petitioner examined. Tr. 1865. The judge thereupon expressed his willingness to order an examination; he simply refused to limit the admissibility of statements made by petitioner during that exam. *Id.*, at 1866.[3] In short, the persons best situated to assess petitioner's state of mind were unanimous in their view that a competency examination was warranted.

In elaborating its argument rejecting petitioner's constitutional claim, the Court of Appeals relied in part on this Court's refusal hitherto to "prescribe a general standard with respect to the nature or quantum of evidence necessary to require resort to" a competency exam, *Drope* v. *Missouri*, *supra*, at 172. See 709

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[2] Cf. *Acosta* v. *Turner*, 666 F. 2d 949, 954–955 (CA5 1982); *Bruce* v. *Estelle*, 536 F. 2d 1051, 1062–1063 (CA5 1976) (discussing the potential impact of schizophrenia upon a defendant's capacity to understand judicial proceedings), cert. denied, 429 U. S. 1053 (1977).

[3] The Court of Appeals brushed aside these concessions, discounting the judge's expressed willingness to order an exam as irrelevant to the issue of petitioner's *right* to an exam, and dismissing the prosecutor's judgment as "mistaken." *Porter* v. *Estelle*, 709 F. 2d 944, 953–954 (1983). Even if one concedes that the trial judge's ruling did not rise to the level of a finding of fact, the judge's receptivity to petitioner's constitutional claim (reflected in the judge's willingness to order a competency exam despite the fact that the jury had already been empaneled) surely is entitled to more weight than it was given by the Court of Appeals.

F. 2d, at 950, n. 3.[4] If our failure to clarify this area of the law has the effect of defeating claims as substantial as that made by petitioner, it is time we reconsidered the issue of a defendant's entitlement to a competency exam and set a standard that would provide lower courts better guidance.

I would grant the petition and set the case for argument.

No. 83–6080. RECTOR *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 280 Ark. 385, 659 S. W. 2d 168.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Supreme Court of Arkansas insofar as it left undisturbed the death sentence imposed in this case. However, even if I believed that capital punishment were constitutional under certain circumstances, I would vote to grant this petition because it raises an important and unresolved question about the composition of juries in capital cases.

Petitioner claims that he was denied his rights under the Sixth and Fourteenth Amendments to have his guilt determined by a fair cross-section of the community. Individuals with conscientious objections to the death penalty were excluded from participating in the liability phase of petitioner's trial. Even if it is permissible for the State to bar such jurors from serving on sentencing juries, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), there is a substantial question whether they may also be excluded from the guilt-determination process, particularly in light of recently compiled empirical evidence that jurors who favor the death penalty are more likely to vote to convict defendants than jurors who oppose capital punishment. See Berry, Death-Qualification and the "Fireside Induction," 5 UALR L. J. 1 (1982); Winick,

[4] Other Courts of Appeals have also emphasized the absence of any "general standard" enunciated in our two decisions in this field. See, *e. g.*, *Williams* v. *Bordenkircher*, 696 F. 2d 464, 466 (CA6), cert. denied *sub nom. Williams* v. *Sowders*, 461 U. S. 916 (1983); *United States ex rel. Rivers* v. *Franzen*, 692 F. 2d 491, 496 (CA7 1982); *Collins* v. *Housewright*, 664 F. 2d 181, 183 (CA8 1981) *(per curiam)*, cert. denied, 455 U. S. 1004 (1982).

Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982).

There can be no doubt that petitioner's claim raises a substantial issue of federal constitutional law. In the past, this Court has acknowledged the potential validity of this issue. See, *e. g.*, *Bumper* v. *North Carolina*, 391 U. S. 543, 545 (1968); *Witherspoon* v. *Illinois*, *supra*, at 516–518. Again this Term, the claim has come to the attention of the Court. *Woodard* v. *Hutchins*, 464 U. S. 377, 379 (1984) (POWELL, J., concurring); *id.*, at 382 (BRENNAN, J., dissenting). Although the Supreme Court of Arkansas rejected the claim in this case, a Federal District Court in that State recently granted a writ of habeas corpus raising precisely the same claim. See *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark. 1983), appeal pending, No. 83–2113 (CA8). These two decisions are squarely in conflict. In light of the conflict, the State of Arkansas "joins petitioner in requesting that this Court grant certiorari to decide this issue as a matter of federal constitutional law." Brief for Respondent 2. Were this not a capital case, I seriously doubt whether this Court would ignore the request of the Arkansas Attorney General to address this unsettled area of federal law.

I dissent.

No. 83–6173. HAMILTON *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga. Certiorari denied. Reported below: 251 Ga. 553, 307 S. E. 2d 667.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner, Roland Paul Hamilton, and his friend, Billie Jean Rose, met John Shinall at a bar one evening, took a few drinks and accompanied Shinall to another bar. Later, Shinall suggested that they go to his house to eat, rest, and watch television before visiting more bars. Shinall died from injuries he suffered during this layover at his home. The State's theory was that petitioner went to Shinall's home with the intention of robbing him and killed him in the process. Petitioner claimed that he struck Shinall in order to prevent him from raping Rose and that Rose, too, participated in subduing Shinall by hitting him over the head with a bottle. According to petitioner, he robbed Shinall only as an

afterthought and without knowledge that Shinall's injuries were fatal.

Armed with Rose as its leading witness, the prosecution succeeded in convincing the jury to convict petitioner of felony murder. After a sentencing trial, the jury found that the murder was accompanied by two aggravating circumstances[1] and condemned petitioner to death. On direct appeal to the Georgia Supreme Court, his conviction and sentence were affirmed. *Hamilton* v. *State*, 244 Ga. 145, 259 S. E. 2d 81 (1979). This Court vacated the sentence and remanded the case for reconsideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). 446 U. S. 961 (1980). On remand, the Georgia Supreme Court reaffirmed the imposition of the death sentence. *Hamilton* v. *State*, 246 Ga. 264, 271 S. E. 2d 173 (1980). This Court then denied a writ of certiorari. 449 U. S. 1103 (1981).

Petitioner next sought habeas corpus relief in the Superior Court of Butts County, Ga., claiming that at both the guilt-innocence and sentencing phases of his trial he had been denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The Superior Court granted a new trial to petitioner based upon evidence produced at five hearings over a span of 18 months.[2] The Supe-

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[1] Pursuant to Ga. Code Ann. §§ 17-10-30(b)(2) and 17-10-30(b)(7) (1982), the jury found that the murder was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim" and that the murder "was committed while the offender was engaged in the commission of another capital felony." Pet. for Cert. 5

[2] The Georgia Supreme Court held that the Superior Court's findings were supported by the evidence, 251 Ga. 553, 307 S. E. 2d 667 (1983), and summarized those findings as follows:

"[T]hat although counsel knew only four or five members of the traverse jury panel, he questioned only three jurors on voir-dire examination, and only as to a matter unrelated to capital punishment; that he made no application for investigative funds and conducted no independent investigation; that no witnesses were personally interviewed prior to their testimony; that the autopsy report and other expert medical evidence revealed that two types of wounds, stabbing and tearing, were inflicted upon the deceased; that this supported Hamilton's statement that Billie Jean Rose hit the victim on the head with a bottle; however, defense counsel failed to cross-examine Billie Jean Rose concerning this; that the deceased had a known propensity for violence, which was not investigated; that there was no investigation of grounds on which Billie Jean Rose's testimony and her credibility could have been impeached; that there was no investigation of a prior criminal conviction entered against

rior Court's meticulous review of the pertinent facts revealed that petitioner had been represented by a court-appointed counsel, John F. M. Ranitz, Jr., whose handling of the case fell far below constitutional standards. Counsel failed to pursue *any* independent, pretrial investigation on petitioner's behalf, neglecting even to interview key witnesses. For example, according to the Superior Court, there were elements in the testimony of the medical examiner that corroborated petitioner's account of the killing. Yet, after having failed to interview the medical examiner prior to trial, counsel displayed incompetence during the trial by failing to bring those corroborative facts before the jury.

Counsel's handling of Billie Jean Rose was even more indicative of his inadequate representation. Although he knew prior to trial that the credibility of Rose's testimony against petitioner would constitute a crucial, if not decisive, part of the case, defense counsel failed to investigate whether there were aspects of her background that could serve to impeach her. Nor did he seek to require the State to disclose that it had agreed not to prosecute Rose for her part in the events that led to the victim's death.

Similarly egregious was counsel's failure to develop possibly exculpatory evidence involving the victim's propensity for violence. According to the Superior Court, the victim's relationship with his common-law wife had been "stormy, even violent." Exhibit C, App. to Pet. for Cert. 8. Petitioner's defense relied in large part upon establishing the victim's propensity for violence. Yet at trial counsel failed to inquire into the victim's relationship with his wife.

This pattern of indifference and incompetence continued into the sentencing phase of the trial. In the words of Judge Etheridge of the Superior Court: "The sentencing phase is stark. There exists only the briefest speech on Paul Hamilton's behalf, and no evidence whatever." *Id.*, at 10. According to Judge Etheridge, counsel "had done nothing to attempt to discover evidence that might have afforded the jury a basis for sparing his client's life. Nothing was presented in evidence as a basis for mercy." *Id.*, at

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Hamilton when he was 18 years of age, even though defense counsel knew that this would be offered against Hamilton if he was convicted; that no member of Hamilton's family was contacted prior to trial, even though they could have given evidence in mitigation; and that the state had an agreement not to prosecute Billie Jean Rose, which defense counsel did not require the state to disclose." *Id.*, at 554, 307 S. E. 2d, at 688.

11. To put the utter worthlessness of counsel's representation in proper perspective, it should be noted that at the evidentiary hearing that accompanied the habeas corpus proceeding, petitioner's mother testified that she had never been asked to testify on her son's behalf; prior to trial, defense counsel failed to contact any member of his client's family.

On appeal, the Georgia Supreme Court affirmed in part and reversed in part. 251 Ga. 553, 307 S. E. 2d 667 (1983). It affirmed the reversal of the death sentence, concluding that petitioner had been denied effective assistance of counsel at the sentencing phase of the trial. However it reversed the Superior Court's order for a new trial, holding that petitioner had not been denied effective assistance at the guilt-innocence stage of his trial because he had not been prejudiced by his attorney's deficient performance. In the court's view, petitioner had not been prejudiced because the evidence led "inexorably to the conclusion that he is guilty of murder." *Id.*, at 555, 307 S. E. 2d, at 669.

This Court should grant a writ of certiorari to review that part of the Georgia Supreme Court's judgment reversing the order for a new trial because it is clear from the record that defense counsel's substandard performance utterly deprived petitioner of effective assistance of counsel at *both* phases of his trial. In *Strickland* v. *Washington*, *ante*, p. 668, this Court today holds that in order to successfully advance an ineffective-assistance claim a defendant must show that his attorney's performance fell below constitutional standards and that the deficient performance actually prejudiced his defense. To meet the prejudice prong of the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ante*, at 694. In this case, there exists a reasonable probability that the outcome would have been different but for the substandard performance of petitioner's counsel.[3] Had counsel sought to impeach the prosecution's main witness, had he sought from the medical examiner favorable testimony that was later elicited at the habeas corpus hearing, had

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[3] I continue to disagree with the Court's analysis in *Strickland*. See *ante*, at 710, 712 (MARSHALL, J., dissenting). The point here is that petitioner is entitled to a new trial even under the unduly burdensome test imposed upon defendants by *Strickland*.

he brought before the jury the victim's propensity towards violence—in short, had defense counsel functioned anywhere within the range of professional conduct expected of attorneys—it is indeed reasonably probable that the jury would have found petitioner guilty of something less serious than capital murder.

Counsel for petitioner displayed the same pattern of incompetence at both the guilt-innocence and sentencing phases of his trial. Yet the Georgia Supreme Court, while willing to recognize that counsel's derelictions prejudiced the defendant at the sentencing phase of the trial, was unwilling to recoginize prejudice at the guilt-innocence phase. One expects a court to justify such differences in result, but the Georgia Supreme Court offered no explanation whatever for its divergent conclusions. It simply dictated a holding that suspiciously resembles an arbitrary, ad hoc compromise—one that appears to have traded the vacation of a death sentence for the reinstatement of a murder conviction. Splitting the loaf in two may constitute justice under certain conditions. However, in cases such as the one at bar, such compromise flies in the face of constitutional demands we are not at liberty to ignore. I therefore dissent from the Court's denial of this petition for a writ of certiorari.

No. 83–6346. TICHNELL *v.* MARYLAND; and CALHOUN *v.* MARYLAND. Ct. App. Md.;

No. 83–6430. HENRY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 83–6459. LUKE *v.* ALABAMA. Sup. Ct. Ala.;

No. 83–6527. KIRKPATRICK *v.* LOUISIANA. Sup. Ct. La.;

No. 83–6568. BATTLE *v.* MISSOURI. Sup. Ct. Mo.; and

No. 83–6583. FOSTER *v.* STRICKLAND, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 83–6346, 297 Md. 432, 468 A. 2d 1 (first case), 297 Md. 563, 468 A. 2d 45 (second case); No. 83–6430, 721 F. 2d 990; No. 83–6459, 444 So. 2d 400; No. 83–6527, 443 So. 2d 546; No. 83–6568, 661 S. W. 2d 487; No. 83–6583, 707 F. 2d 1339.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82–1256. LYNCH, MAYOR OF PAWTUCKET, ET AL. *v.* DONNELLY ET AL., 465 U. S. 668;

No. 82–5857. APONTE *v.* UNITED STATES, 465 U. S. 1099;

No. 83–888. JACOB *v.* UNITED STATES, *ante*, p. 903;

No. 83–956. BERRYMAN *v.* UNITED STATES, 465 U. S. 1100;

No. 83–1120. SCARSELLETTI *v.* AETNA CASUALTY & SURETY CO., 465 U. S. 1029;

No. 83–1160. MCAULIFFE ET AL. *v.* PENTHOUSE INTERNATIONAL LTD., 465 U. S. 1108;

No. 83–1419. AVERY *v.* UNITED STATES, *ante*, p. 905;

No. 83–5736. SCOTT *v.* UNITED STATES, *ante*, p. 906;

No. 83–5998. MALLY *v.* NEW YORK UNIVERSITY ET AL., 465 U. S. 1035;

No. 83–6121. NELSON *v.* WILLIE, WARDEN, ET AL., 465 U. S. 1105;

No. 83–6228. ROCHE *v.* MAGGIO, WARDEN, *ante*, p. 907;

No. 83–6311. APONTE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 930;

No. 83–6331. MINOR *v.* VETERANS ADMINISTRATION ET AL., *ante*, p. 930; and

No. 83–6372. DI SILVESTRO *v.* UNITED STATES, *ante*, p. 931. Petitions for rehearing denied.

No. 82–914. MONSANTO CO. *v.* SPRAY-RITE SERVICE CORP., 465 U. S. 752. Petition for rehearing denied. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 83–851. SOUTH STREET SEAPORT MUSEUM, AS OWNER OF THE BARK PEKING *v.* MCCARTHY ET AL., 465 U. S. 1078. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 83–1200. NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL. *v.* AMERICAN MAIL LINE, LTD., ET AL., 465 U. S. 1109. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 994 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE *v.* ROSE

ON APPLICATION FOR STAY

No. A–935 (83–1747). Decided May 19, 1984

An application to stay the Court of Appeals' judgment affirming the District Court's grant of habeas corpus relief to respondent Ohio prisoner—who was convicted of murder in 1979 and who, under the Court of Appeals' ruling, is entitled to a new trial and to release pending retrial—is granted pending disposition of applicant's petition for a writ of certiorari. Petitioner concedes that certain statements made by respondent to a police officer and introduced at respondent's trial were elicited in violation of *Edwards* v. *Arizona*, 451 U. S. 477, which was decided after respondent's conviction but before it became final. The Court of Appeals concluded that *Edwards* should be applied retroactively to respondent's case. Because petitioner's petition presents an open question and because this Court's subsequent decision in *Solem* v. *Stumes*, 465 U. S. 638, makes highly doubtful the correctness of the Court of Appeals' decision, it is likely that four Justices will vote to grant certiorari. This Court will likely either reverse the Court of Appeals' judgment or vacate the judgment and remand the case for reconsideration in light of *Solem*. Finally, the "stay equities" balance in applicant's favor.

JUSTICE O'CONNOR, Circuit Justice.

The petitioner in No. 83–1747 is the Superintendent of the Chillicothe Correctional Institute at Chillicothe, Ohio. The respondent is an Ohio prisoner in petitioner's custody. Respondent applied to the United States District Court for the Southern District of Ohio for a writ of habeas corpus. The District Court granted the writ, and the United States Court of Appeals for the Sixth Circuit affirmed. *Rose* v. *Engle*, 722 F. 2d 1277 (1983). Petitioner challenges that decision in No. 83–1747.

Respondent, who is entitled to a new trial under the Court of Appeals' ruling, has been ordered released on May 21, 1984, pending retrial. Petitioner seeks a stay of the Court of Appeals' judgment until this Court completes its consideration of his petition. In deciding whether to grant the requested stay, I am obliged to determine whether four Justices are likely to vote to grant certiorari, to balance the "stay equities," and to gauge the likely outcome of this Court's consideration of the case on the merits. See *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers). I conclude that the stay should be granted.

Respondent was convicted of murder in 1979. At the trial, the prosecutor introduced certain statements that respondent made, after he had invoked his right to silence and to the presence of an attorney, in response to a police officer's renewed questioning. Petitioner concedes that these statements were elicited in violation of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), decided two years after respondent's conviction.

The Court of Appeals affirmed the District Court's grant of habeas relief because it concluded, following the analysis of *United States* v. *Johnson*, 457 U. S. 537 (1982), that *Edwards* should be applied retroactively to respondent's case. The court observed that respondent's conviction had not become final at the time *Edwards* was decided, since the time for filing a petition for a writ of certiorari on direct appeal expired at the end of the very day *Edwards* was handed down. The issue presented in the petition is whether the *Edwards* decision should have been applied to respondent's case.

In *Solem* v. *Stumes*, 465 U. S. 638 (1984), this Court recently decided that *Edwards* v. *Arizona* "is not to be applied in collateral review of final convictions." 465 U. S., at 650. The Court expressly declined to decide whether *Edwards* was retroactive in collateral proceedings for any case, such as

respondent's, in which the conviction was not yet final when *Edwards* was decided. The petition in No. 83–1747 accordingly presents a question left open in *Solem* v. *Stumes*.

The Court's decision in *Stumes*, however, sheds considerable light on the correctness of the Sixth Circuit's decision in respondent's case. First, the Court concluded, contrary to the Sixth Circuit's view, that the analysis adopted in *United States* v. *Johnson*, *supra*, is not applicable to the decision whether *Edwards* is retroactive. 465 U. S., at 643, n. 3. Thus, the Court of Appeals followed an erroneous approach in considering the retroactivity of *Edwards*. Second, the rationale of the Court in *Solem* v. *Stumes* casts into substantial doubt the Sixth Circuit's conclusion that *Edwards* presents a ground for ordering a new trial in respondent's case. The Court reasoned that *Edwards* "has only a tangential relation to truthfinding at trial," 465 U. S., at 643–644; that police cannot "be faulted if they did not anticipate [the] *per se* approach" of *Edwards*, 465 U. S., at 647; and that "retroactive application of *Edwards* would have a disruptive effect on the administration of justice," *id.*, at 650. Although new arguments, of course, might be made to blunt the force of this reasoning in cases presenting different facts from those presented in *Stumes*, the reasoning of *Stumes* strongly suggests that *Edwards* should not retroactively render inadmissible a statement, such as those at issue in respondent's case, obtained by police years before *Edwards* was decided.

Because the petition in No. 83–1747 presents an open question and because *Solem* v. *Stumes* makes highly doubtful the correctness of the decision of the Court of Appeals, I think it likely that four Justices will vote to grant the petition. As for disposition of the case on the merits, I think it likely that the Court will either (1) give plenary consideration to the question left open in *Solem* v. *Stumes* and reverse the judgment of the Court of Appeals or (2) vacate the Court of Appeals' judgment and remand the case for reconsideration in light of *Solem* v. *Stumes*. I further conclude that the "stay

equities" balance in petitioner's favor: granting the stay for the time necessary to consider the petition should not cause a significant incremental burden to respondent, who has been incarcerated for several years, but doing so will relieve the State of Ohio of the burden of releasing respondent or retrying him.

I therefore grant the application for a stay of the judgment of the United States Court of Appeals for the Sixth Circuit in *Rose* v. *Engle*, *supra*, pending disposition of the petition for a writ of certiorari in No. 83–1747.

It is so ordered.

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containing stolen items purchased from such third party by respondent was parked behind respondent's home and that respondent was going to move motor home, (2) caller admitted her identity and stated that she had been respondent's girlfriend but that she had broken up with him and "wanted to burn him," and (3) police officer verified location of motor home, officer's affidavit setting forth information noted above provided a substantial basis for a Magistrate's issuance of a warrant to search motor home under Fourth Amendment "totality of circumstances" test. Massachusetts v. Upton, p. 727.

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Product disparagement action—"Actual malice" requirement—Review of District Court judgment.—"Clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) does not prescribe standard for a court of appeals' review of a district court's determination of "actual malice" in a defamation action governed by constitutional rule requiring a showing that false disparaging statements about a "public figure" were made with actual malice, appellate court instead having an obligation to independently examine record; Court of Appeals properly concluded that record did not establish actual malice in product disparagement action against respondent for false statements in its magazine article evaluating quality of a loudspeaker system marketed by petitioner. Bose Corp. v. Consumers Union of United States, Inc., p. 485.

PRODUCT DISPARAGEMENT. See **Procedure.**

PUBLIC ACCESS TO FEDERAL COMMUNICATIONS COMMISSION "CONSULTATIVE PROCESS" MEETINGS. See **Government in the Sunshine Act.**

PUBLIC EMPLOYEES. See **Civil Rights Act of 1871, 1.**

PUBLIC TRUST EASEMENTS. See **Water Rights.**

PUBLISHING JUROR INFORMATION DURING TRIAL. See **Criminal Law, 3.**

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964, 2; Constitutional Law, III; Voting Rights Act of 1965.**

RAILWAY LABOR ACT.

Union shop—Use of employees' compelled dues or fees.—Under Act's provisions authorizing a union shop, union could properly use employees'

RAILWAY LABOR ACT—Continued.

compelled dues or fees for costs of national union's conventions, union social activities, and monthly union magazine insofar as it reported activities that union could charge dissenting employees for doing—there being no First Amendment barrier with regard to use of employees' dues or fees for such activities—but unions could not charge objecting employees for union organizing efforts or for expenses of litigation that were not incident to negotiating or administering bargaining agreements or to settling disputes arising in bargaining unit; union's rebate approach for refunding portion of objecting employees' dues or fees expended for improper purposes was inadequate. Ellis v. Railway Clerks, p. 435.

RES JUDICATA. See **Civil Rights Act of 1871, 1.**

RIGHT TO COUNSEL. See **Constitutional Law, VI.**

RIGHT TO REMAIN SILENT. See **Criminal Law, 1.**

RIPARIAN RIGHTS. See **Boundaries.**

SEARCHES AND SEIZURES. See **Constitutional Law, VII.**

SECRET SERVICE CRIMINAL INVESTIGATIONS. See **Criminal Law, 2.**

SELF-INCRIMINATION. See **Criminal Law, 1.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964, 2.**

SHERMAN ACT. See **Antitrust Acts.**

SIGNS FOR POLITICAL CANDIDATES. See **Constitutional Law, IV.**

SIXTH AMENDMENT. See **Constitutional Law, VI.**

SKETCHING JURORS DURING TRIAL. See **Criminal Law, 3.**

SOCIAL SECURITY ACT.

Medicare—Validity of regulations—Jurisdiction.—Where Secretary of Health and Human Services first issued an instruction in 1979 to fiscal intermediaries that no payment was to be made for Medicare claims arising from a certain surgical procedure and then issued a formal ruling in 1980 to preclude administrative law judges and Appeals Council from ordering payments for such surgical procedure occurring thereafter, Federal District Court lacked either federal-question or mandamus jurisdiction of suit brought by respondents (who either had been denied reimbursement for surgery in question performed before 1980 or never had such surgery because of inability to afford it) challenging legality of Secretary's actions, since respondents had failed to exhaust administrative remedies as required by § 405(g) of Act. Heckler v. Ringer, p. 602.

STATE-ACTION DOCTRINE. See **Antitrust Acts, 1.**

STATE BOUNDARIES. See **Boundaries.**

STATE-COURT JURISDICTION. See **Constitutional Law, II.**

STATE FRANCHISE TAXES. See **Constitutional Law, I.**

STATE PERSONAL PROPERTY TAXES. See **Constitutional Law, V.**

STATUTES OF LIMITATIONS. See **Civil Rights Act of 1964, 1.**

STAYS.

Habeas corpus relief to state prisoner.—Application to stay Court of Appeals' judgment affirming District Court's grant of habeas corpus relief to respondent state prisoner—who, under Court of Appeals' ruling, was entitled to a new trial and to release pending retrial—is granted pending disposition of state prison official's petition for a writ of certiorari to review Court of Appeals' ruling relating to admissibility of statements made by respondent to police. Tate v. Rose (O'CONNOR, J., in chambers), p. 1301.

SUBPOENAS ISSUED BY EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964, 2.**

TAXES. See **Constitutional Law, I; V.**

TELECOMMUNICATIONS FACILITIES. See **Federal Communications Commission; Government in the Sunshine Act.**

TELEVISING JURORS DURING TRIAL. See **Criminal Law, 3.**

TESTS FOR DRUGS. See **Constitutional Law, VII, 5.**

TOLLING OF LIMITATIONS PERIOD. See **Civil Rights Act of 1964, 1.**

TRAFFIC OFFENSES. See **Constitutional Law, VII, 3.**

TREATY OF GUADALUPE HIDALGO. See **Water Rights.**

TRUST FUNDS UNDER COLLECTIVE-BARGAINING AGREEMENTS. See **Collective-Bargaining Agreements.**

TYING ARRANGEMENTS. See **Antitrust Acts, 2.**

UNION DUES AND FEES. See **Railway Labor Act.**

UNION SHOPS. See **Railway Labor Act.**

UNIONS' LIABILITY FOR BACKPAY. See **National Labor Relations Board.**

VIDEOTAPING JURORS DURING TRIAL. See **Criminal Law, 3.**

VOTING RIGHTS ACT OF 1965.

County Commissioners—Validity of election system.—Where Court of Appeals affirmed District Court's judgment holding that an at-large

VOTING RIGHTS ACT OF 1965—Continued.

system for electing County Commissioners violated Fourteenth Amendment rights of appellee black voters but did not review District Court's conclusion that election system also violated Act, this Court will not decide constitutional question but, instead, will vacate Court of Appeals' judgment and remand case for that court's consideration of statutory question. Escambia County v. McMillan, p. 48.

WARRANT TO SEARCH MOTOR HOME. See **Constitutional Law**, VII, 6.

WARSAW CONVENTION.

Lost cargo—Air carrier's liability.—Provision of Convention (ratified by United States in 1934) setting a limit on an international air carrier's liability for lost cargo at 250 gold French francs per kilogram (convertible into any national currency) was not rendered unenforceable by 1978 repeal of Par Value Modification Act, which had set an "official" price of gold in United States, and liability limit of $9.07 per pound (last official price of gold) was not inconsistent with domestic law or with Convention itself. Trans World Airlines, Inc. v. Franklin Mint Corp., p. 243.

WATER RIGHTS.

Ballona Lagoon—Public trust easement.—Where petitioner's predecessors-in-interest had their fee title to Ballona Lagoon confirmed in federal patent proceedings pursuant to an 1851 Act that was enacted to implement Treaty of Guadalupe Hidalgo, and California made no claim to any interest in lagoon at that time, it was precluded now from asserting a public trust easement in lagoon. Summa Corp. v. California ex rel. State Lands Comm'n, p. 198.

WISCONSIN. See **Constitutional Law**, VII, 3.

WORDS AND PHRASES.

1. "*Any matter within the jurisdiction of any department or agency of the United States.*" 18 U. S. C. § 1001. United States v. Rodgers, p. 475.

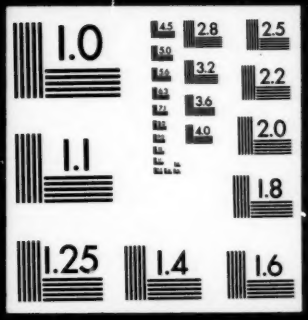
2. "*In custody.*" 28 U. S. C. § 2254(b). Justices of Boston Municipal Court v. Lydon, p. 294.

3. "*Judicial proceedings.*" 28 U. S. C. § 1738. McDonald v. West Branch, p. 284.

4. "*Meeting of an agency.*" Government in the Sunshine Act, 5 U. S. C. § 552b(b). FCC v. ITT World Communications, Inc., p. 463.

WORK FORCE SEARCHES FOR ILLEGAL ALIENS. See **Constitutional Law**, VII, 2.

WRONGFUL-DEATH ACTIONS. See **Constitutional Law**, II.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